ONTARIO
LABOUR RELATIONS BOARD
REPORTS

November/December 2009

Ontario

ONTARIO LABOUR RELATIONS BOARD

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A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2009] OLRB REP. NOVEMBER/DECEMBER

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

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UBCJA; RE UBCJA, LOCAL 446; GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND DRYWALL & ALLIED WORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS CONSTITUENT LOCAL UNIONS 972

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V.K. MASON CONSTRUCTION CO., ET AL; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, ET AL; RE LIUNA 985

Bargaining Unit – Certification – Conflict of Interest – The union sought to certify full- and part-time security officers in two bargaining units – The University challenged the propriety of having the union represent the guards when it already represented a unit of staff (non-faculty) employees – The Board examined the duties of the security officers and found that the majority of their time is spent staffing parking booths, opening locked doors, dealing with student issues, or monitoring video surveillance cameras that are not generally trained on employees at work; very little time is devoted to dealing with staff in the other bargaining unit – The Board's jurisprudence suggests that s. 14 of the Act has been applied to security officers who monitor other employees or protect an employer's property – While the guards at issue do protect university property, the Board found they do not do so in relation to the activities of other staff, so there would be no conflict of interest in having the applicant represent the guards

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Bargaining Unit – Certification – Related Employer – KAS, a long-term employment agency, supplied Metro with employees to operate a plant in Scarborough – Metro contracted out its core functions at the plant to KAS employees – In response to Metro's claim that they had no employees in the proposed bargaining unit, the union launched a related employer application under s. 1(4) of the *Labour Relations Act* – The Board asked which employer had fundamental control over working conditions, and whether or not the two employers were both functionally integrated with respect to the operation of the plant – The Board found that both KAS and Metro exercised direction and control over the employees performing the work, and together facilitated the operation of the plant – There were many examples in the evidence of KAS and Metro sharing decision-making regarding KAS employees – Certificate issued to the applicant – KAS and Metro declared a single employer

METRO WASTE PAPER RECOVERY INC. C.O.B. METRO MUNICIPAL RECYCLING SERVICES INC.; RE TEAMSTERS LOCAL UNION NO. 419; RE THE K.A.S. GROUP OF COMPANIES INC........ 911

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Certification – Construction Industry – Employee Status – Membership Evidence – Representation Vote – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental mis-representation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486.. 936

Certification – Construction Industry – Sale of a Business – CCWU applied to certify the employees of YYZed – Local 183 also filed an application for certification but equally asserted that there was a sale of a business from Weston to YYZed (Weston and Local 183 were signatories to a collective agreement) – Weston was a corporation incorporated by four individuals who developed a series of high-rise residential projects (each separately incorporated) – After the completion of Weston, the partners went their separate ways and one subsequently incorporated YYZed to develop a new property – The Board held that a key figure may sometimes suggest a relationship or continuity of businesses but in this case the individual in question did not represent the essence or personification of Weston in order for the sale of business application to succeed – Sale of business application dismissed; Local 183's application for certification dismissed – CCWU's application succeeds; parties directed to file submissions on appropriate bargaining unit

2043102 ONTARIO LIMITED O/A YYZed PROJECT MANAGEMENT; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE LIUNA, LOCAL 183.......... 783

Collective Agreement – Construction Industry Grievance – *Ontario Human Rights Code* – Remedies – A crane operator, with nineteen years experience and a clean discipline and accident record, reversed his crane into three overhead power lines resulting in an explosion and loss of power in the area – The employer, after an immediate site investigation, was not able to rule out impairment through the use of drugs or alcohol and, in accordance with its policy, directed the grievor to submit to drug and alcohol testing – The grievor refused to submit to the testing on information from his union that such a request violated his human rights – The employer considered his refusal to be a positive test result and, as a result in addition to a ten-day suspension, he was held out of service – First, the Board found the employer's policy—to conduct post incident urinalysis testing in a safety sensitive workplace—was in compliance with the collective agreement (a legitimate exercise of management rights) and the *Code* – Second, the Board found that the employer did not violate either the collective agreement or the *Code* by requiring the grievor to submit to the test – Third, the Board found that the employer's treatment of the grievor's refusal as a positive test result was without any consideration of the surrounding factors that may have mitigated against that conclusion: the veracity of the reasons for refusing the test and the long service of the applicant without any discipline or accident – Treating the grievor's refusal to submit to a test as a positive result was an unreasonable exercise of management rights, and discrimination of the grievor on the basis of a perception that he was a substance abuser, respectively amounting to a violation of the collective agreement and s. 5 of the *Code* – Finally, the Board found that the employer's holding the employee out of service was a violation of the collective agreement and *Code* which flowed from the above analysis – Declarations and directions made – Grievance allowed

STERLING CRANE – A DIVISION OF PROCRANE INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 952

Collective Agreement – Grievance – Related Employer – Termination – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl Canada brought a motion to have the s. 1(4) application dismissed – A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

BUNZL CANADA INC., 1456944 ONTARIO INC., BUNZL DISTRIBUTION INC., MORGAN SCOTT INC., 1547296 ONTARIO INC. AND 1705375 ONTARIO INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA LOCAL 175 795

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LAURENTIAN UNIVERSITY; RE LAURENTIAN UNIVERSITY STAFF UNION; RE UNITED STEELWORKERS 890

Constitutional Law — Non-Construction Employer — Remedies — The Board found that the IESO met the statutory preconditions for a declaration that it is a non-construction employer within the meaning of s. 127.2 of the Act because although it performs construction work from time to time, it does no work in the industry for which it expects compensation from an unrelated person — CUSW and the Labourers challenged the constitutionality of the provision, alleging that subsections 127.2 (1) and (2) violate their members' freedom of association (s. 2(d) of the *Canadian Charter of Rights and Freedoms*) by substantially interfering with their right to organize and bargain collectively — The Unions also challenged the constitutionality of s. 127.2 (3), which contemplates that their respective collective agreements with IESO cease to apply upon the Board's declaration — The Board held that the Supreme Court's decision in *B.C. Health Services* protected the "procedure" known as collective bargaining, rather than the fruits of the bargaining process, and that protection included the notion of association rather than merely the economic rights of the union — The impugned sections of the Act repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future processes by stripping the unions of their right to have their representations considered by the IESO in a process of good faith bargaining — The interference is substantial such that it constitutes a breach of freedom of association and is not justified under s. 1 of the *Charter* — The challenged provisions go well beyond providing a mechanism for movement from one labour relations regime to another; they end the process of collective bargaining altogether and destroy the product of the exercise of the right of the unions' members to engage in the process — S. 127.2 of the Act declared constitutionally inoperative

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) 826

Construction Industry — Alteration of Jurisdiction — Interference with Trade Union — Local 446 alleged that its parent union, UBCJA, improperly altered its jurisdiction by merging it with another local — The Board addressed the factors set out under s. 147(3) and found that: the process used by UBCJA was acceptable in that it complied with its constitution and comported with the Act; Local 446 was no longer a viable local union, whereas its merger would allow for the pooling of resources; and the merged local would be stronger financially and have more resources to allocate to organizing, training and servicing the increased membership without creating any serious labour relations problems — The Board found that the UBCJA's decision was not only a fair and reasonable one in all the circumstances, but it was fully justified — Application dismissed

UBCJA; RE UBCJA, LOCAL 446; GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND DRYWALL & ALLIED WORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS CONSTITUENT LOCAL UNIONS 972

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2043102 ONTARIO LIMITED O/A YYZed PROJECT MANAGEMENT; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE LIUNA, LOCAL 183........... 783

Construction Industry – First Contract Arbitration – The parties had reached a deadlock regarding their positions on pension and benefits contributions – The union proposed that the employer contribute to centralized union pension and welfare plans, a common and fundamental feature of virtually all collective agreements in the construction industry – The employer, which only secures construction work from time to time, maintained a secure workforce by employing its construction workers in a non-construction capacity when construction work was not available – It did not wish to alter its benefits package since its package covered employees in the bargaining unit whether or not they were employed in the construction industry – The Board found that the position taken by the employer on the applicant's pension and benefit contribution proposal clearly reflected a difficulty on the part of the employer to accept the role of the applicant as the exclusive bargaining agent of its construction employees – Concerning the benefits package the employer's position that the employees would be better off with their current package than the one proposed by the union suggests that the employer was advocating on behalf of the members of the bargaining unit —a role which belongs exclusively to the union – A similar concern arose with respect to pension contributions, since the employer was prepared to pay the cost of the pension benefit, as long as there was no suggestion to any of its other employees that the applicant secured that benefit for the construction labourers employed by the employer – Direction to settle a first collective agreement by arbitration

CONSOLIDATED DRILLING AND BLASTING INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 803

Construction Industry – Judicial Review – Related Employer – Sale of a Business – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – On judicial review, concerning the single employer application, the court noted there was no identity of existence between the pre- and post-amalgamation corporations, something contemplated by the Amalgamation Agreement and the *Business Corporations Act* – The Board's decision not to exercise its discretion to grant the relief requested was reasonable – The Court also found the Board's finding that there was no sale of business at any time was reasonable – Application dismissed

IUPAT; RE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., ET AL.. 1018

Construction Industry Grievance – Collective Agreement – *Ontario Human Rights Code* – Remedies – A crane operator, with nineteen years experience and a clean discipline and accident record, reversed his crane into three overhead power lines resulting in an explosion and loss of power in the area – The employer, after an immediate site investigation, was not able to rule out impairment through the use of drugs or alcohol and, in accordance with its policy, directed the grievor to submit to drug and alcohol testing – The grievor refused to submit to the testing on information from his union that such a request violated his human rights – The employer considered his refusal to be a positive test result and, as a result in addition to a ten-day suspension, he was held out of service – First, the Board found the employer's policy—to conduct post incident urinalysis testing in a safety sensitive workplace—was in compliance with the collective agreement (a legitimate exercise of management rights) and the *Code* – Second, the Board found that the employer did not violate either the collective agreement or the *Code* by requiring the grievor to submit to the test – Third, the Board found that the employer's treatment of the grievor's refusal as a positive test result was without any consideration of the surrounding factors that may have mitigated against that conclusion: the veracity of the reasons for refusing the test and the long service of the applicant without any discipline or accident – Treating the grievor's refusal to submit to a test as a positive result was an unreasonable exercise of management rights, and discrimination of the grievor on the basis of a perception that he was a substance abuser, respectively amounting to a violation of the collective agreement and s. 5 of the *Code* – Finally, the Board found that the employer's holding the employee out of service was a violation of the collective agreement and *Code* which flowed from the above analysis – Declarations and directions made – Grievance allowed

STERLING CRANE – A DIVISION OF PROCRANE INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 952

Construction Industry Grievance – Settlement – The employer sought a declaration that it was not required to apply the terms and conditions of the collective agreement between the applicant and the contractors association to which the employer belonged (the "High Rise Agreement") – The Board found that through a series of earlier applications, including an accreditation and minutes of settlement in a related employer file, the employer became bound to the "Low Rise Agreement" – One of the provisions of the latter agreement required the employer to apply the terms of the High Rise Agreement if its employees performed work on a building captured by that agreement (the "cross-over" clause) – Finding the accreditation irrelevant to the issue before it, the Board held that the employer's signing of the Low Rise Agreement bound the employer to all of its provisions, and one of those provisions required that the employer apply the terms and conditions of the High Rise Agreement in appropriate circumstances – Motion dismissed; matter referred to Manager of Field Services

WASAGA TRIM SUPPLY (2006) INC.; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA; RE THE TRIM ASSOCIATION OF ONTARIO 1012

Employee Status – Certification – Construction Industry – Membership Evidence – Representation Vote – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental mis-representation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 936

Estoppel – Unfair Labour Practice – Schneider's Employee Association brought a complaint that Maple Leaf had violated s. 70 of the Act by failing to provide the Association with the names of employees in receipt of weekly indemnity benefits – The employer brought a preliminary motion for dismissal of the application on the basis of issue estoppel, since the matter had already been decided by an arbitrator – The Board found that the arbitrator had correctly recognized his lack of jurisdiction to decide the issue, since it arose from a breach of the Act rather than a substantive provision in the collective agreement; the arbitrator's "in the alternative" opinion or *obiter dicta* was not dispositive of the complaint – The Board held that it had an obligation to ensure the protection of the rights granted by the Act, and as such had exclusive jurisdiction where a consideration of policy issues was required – The motion for dismissal was denied – Matter set down for hearing

MAPLE LEAF CONSUMER FOODS INC.; RE SCHNEIDER'S EMPLOYEES ASSOCIATION 904

First Contract Arbitration – Construction Industry – The parties had reached a deadlock regarding their positions on pension and benefits contributions – The union proposed that the employer contribute to centralized union pension and welfare plans, a common and fundamental feature of virtually all collective agreements in the construction industry – The employer, which only secures construction work from time to time, maintained a secure workforce by employing its construction workers in a non-construction capacity when construction work was not available – It did not wish to alter its benefits package since its package covered employees in the bargaining unit whether or not they were employed in the construction industry – The Board found that the position taken by the employer on the applicant's pension and benefit contribution proposal clearly reflected a difficulty on the part of the employer to accept the role of the applicant as the exclusive bargaining agent of its construction employees – Concerning the benefits package the employer's position that the employees would be better off with their current package than the one proposed by the union suggests that the employer was advocating on behalf of the members of the bargaining unit —a role which belongs exclusively to the union – A similar concern arose with respect to pension contributions, since the employer was prepared to pay the cost of the pension benefit, as long as there was no suggestion to any of its other employees that the applicant secured that benefit for the construction labourers employed by the employer – Direction to settle a first collective agreement by arbitration

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Grievance – Collective Agreement – Related Employer – Termination – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl

Canada brought a motion to have the s. 1(4) application dismissed – A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

BUNZL CANADA INC., 1456944 ONTARIO INC., BUNZL DISTRIBUTION INC., MORGAN SCOTT INC., 1547296 ONTARIO INC. AND 1705375 ONTARIO INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA LOCAL 175 795

Health and Safety – The employer sought a suspension of orders requiring it to provide its health care workers involved in administering the H1N1 vaccine with respirators and eye protection – The Board found that the workers would be nominally safer if they were furnished with the appropriate respirator; prejudice to the employer would be minimal; there was a *prima facie* case for a successful appeal because of the other precautions and protections in place at the employer's premises – The measures adopted by the employer and the expertise of the workers in identifying ill people gave them substantial protection not available to many other public workers – Since the employer could not satisfy all three criteria for a suspension of the orders, the request was denied

HASTINGS AND PRINCE EDWARD COUNTIES HEALTH UNIT; RE ONTARIO NURSES' ASSOCIATION, CUPE, LORALEE IDLER, INSPECTOR.............................. 823

Interference with Trade Union – Alteration of Jurisdiction – Construction Industry – Local 446 alleged that its parent union, UBCJA, improperly altered its jurisdiction by merging it with another local – The Board addressed the factors set out under s. 147(3) and found that: the process used by UBCJA was acceptable in that it complied with its constitution and comported with the Act; Local 446 was no longer a viable local union, whereas its merger would allow for the pooling of resources; and the merged local would be stronger financially and have more resources to allocate to organizing, training and servicing the increased membership without creating any serious labour relations problems – The Board found that the UBCJA's decision was not only a fair and reasonable one in all the circumstances, but it was fully justified – Application dismissed

UBCJA; RE UBCJA, LOCAL 446; GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND DRYWALL & ALLIED WORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS CONSTITUENT LOCAL UNIONS....................................... 972

Judicial Review – Construction Industry – Related Employer – Sale of a Business – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – On judicial review, concerning the single employer application, the court noted there was no identity of existence between the pre- and post-amalgamation corporations, something contemplated by the Amalgamation Agreement and the *Business Corporations Act* – The Board's decision not to exercise its discretion to grant the relief requested was reasonable – The

Court also found the Board's finding that there was no sale of business at any time was reasonable – Application dismissed

IUPAT; RE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., ET AL. 1018

Judicial Review – *Prima Facie* Motion – Related Employer – Sale of a Business – CUPE alleged that the City of Ottawa and the other responding parties were a single employer because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the City – On a motion by the City to dismiss for no *prima facie* case, the Board held that the union was unable to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The Board further held that the City's existing relationships with CUPE and the contractors permitted contracting out, and any operational control over the work performed by the contractors was to be expected given the City's mandate to provide municipal services – On judicial review, the Court found that CUPE had not been denied natural justice or procedural fairness since a hearing into the motion had been held and the parties were given the opportunity to make full submissions – The Court found the Board's exercise of discretion under s. 1(4)of the Act to be reasonable – Application dismissed

OTTAWA-CARLETON PUBLIC EMPLOYEES UNION (CUPE), LOCAL 503; RE CITY OF OTTAWA; ET AL. 1020

Jurisdictional Dispute – CEP, Local 92 challenged the decision of the employer, AbitibiBowater Canada Inc, which assigned work to IAM that involved the operation of a front end loader and fork lift for the purposes of moving biomass fuel – The Board considered the usual factors and held that both unions could claim the work in question under their collective agreements, that they both had operated similar machinery and thus both possessed the required skill set to do the work, so these factors were indeterminative – However, the Board acknowledged that safety, economy and efficiency, and employer preference all favoured IAM – IAM workers had particular and unique knowledge of the Biomass Boiler system that allowed them to make appropriate decisions in event of difficulties – Due to its relative proximity to the site, IAM workers were available on a 24/7 basis as required, while CEP workers were not, since their yard only operated during the day – The employer preference to use IAM was grounded in valid labour relations or operational concerns, since if it was required to use CEP employees to perform the work, they would have to hire 5 more employees to cover all the required shifts, and there would be no duties for these employees half the time – Assignment of work to IAM upheld – Application dismissed

ABITIBIBOWATER CANADA INC.; AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 771; RE CEP, LOCAL 92 788

Membership Evidence – Certification – Construction Industry – Employee Status – Representation Vote – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental mis-representation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 936

Non-Construction Employer – Constitutional Law – Remedies – The Board found that the IESO met the statutory preconditions for a declaration that it is a non-construction employer within the meaning of s. 127.2 of the Act because although it performs construction work from time to time, it does no work in the industry for which it expects compensation from an unrelated person – CUSW and the Labourers challenged the constitutionality of the provision, alleging that subsections 127.2 (1) and (2) violate their members' freedom of association (s. 2(d) of the *Canadian Charter of Rights and Freedoms)* by substantially interfering with their right to organize and bargain collectively – The Unions also challenged the constitutionality of s. 127.2 (3), which contemplates that their respective collective agreements with IESO cease to apply upon the Board's declaration – The Board held that the Supreme Court's decision in *B.C. Health Services* protected the "procedure" known as collective bargaining, rather than the fruits of the bargaining process, and that protection included the notion of association rather than merely the economic rights of the union – The impugned sections of the Act repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future processes by stripping the unions of their right to have their representations considered by the IESO in a process of good faith bargaining – The interference is substantial such that it constitutes a breach of freedom of association and is not justified under s. 1 of the *Charter* – The challenged provisions go well beyond providing a mechanism for movement from one labour relations regime to another; they end the process of collective bargaining altogether and destroy the product of the exercise of the right of the unions' members to engage in the process – S. 127.2 of the Act declared constitutionally inoperative

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) 826

Ontario Human Rights Code – Collective Agreement – Construction Industry Grievance – Remedies – A crane operator, with nineteen years experience and a clean discipline and accident record, reversed his crane into three overhead power lines resulting in an explosion and loss of power in the area – The employer, after an immediate site investigation, was not able to rule out impairment through the use of drugs or alcohol and, in accordance with its policy, directed the grievor to submit to drug and alcohol testing – The grievor refused to submit to the testing on information from his union that such a request violated his human rights – The employer considered his refusal to be a positive test result and, as a result in addition to a ten-day suspension, he was held out of service – First, the Board found the employer's policy—to conduct post incident urinalysis testing in a safety sensitive workplace—was in compliance with the collective agreement (a legitimate exercise of management rights) and the *Code* – Second, the Board found that the employer did not violate either the collective agreement or the *Code* by requiring the grievor to submit to the test – Third, the Board found that the employer's treatment of the grievor's refusal as a positive test result was without any consideration of the surrounding factors that may have mitigated against that conclusion: the veracity of the reasons for refusing the test and the long service of the applicant without any discipline or accident – Treating the grievor's refusal to submit to a test as a positive result was an unreasonable exercise of management rights, and discrimination of the grievor on the basis of a perception that he was a substance abuser, respectively amounting to a violation of the collective agreement and s. 5 of the *Code* – Finally, the Board found that the employer's holding the employee out of service was a violation of the collective agreement and *Code* which flowed from the above analysis – Declarations and directions made – Grievance allowed

STERLING CRANE – A DIVISION OF PROCRANE INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 952

Prima Facie Motion – Judicial Review – Related Employer – Sale of a Business – CUPE alleged that the City of Ottawa and the other responding parties were a single employer because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the City – On a motion by the City to dismiss for no *prima facie* case, the Board held that the union was unable to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The Board further held that the City's existing relationships with CUPE and the contractors permitted contracting out, and any operational control over the work performed by the contractors was to be expected given the City's mandate to provide municipal services – On judicial review, the Court found that CUPE had not been denied natural justice or procedural fairness since a hearing into the motion had been held and the parties were given the opportunity to make full submissions – The Court found the Board's exercise of discretion under s. 1(4)of the Act to be reasonable – Application dismissed

OTTAWA-CARLETON PUBLIC EMPLOYEES UNION (CUPE), LOCAL 503; RE CITY OF OTTAWA; ET AL 1020

Related Employer – Bargaining Unit – Certification – KAS, a long-term employment agency, supplied Metro with employees to operate a plant in Scarborough – Metro contracted out its core functions at the plant to KAS employees – In response to Metro's claim that they had no employees in the proposed bargaining unit, the union launched a related employer application under s. 1(4) of the *Labour Relations Act* – The Board asked which employer had fundamental control over working conditions, and whether or not the two employers were both functionally integrated with respect to the operation of the plant – The Board found that both KAS and Metro exercised direction and control over the employees performing the work, and together facilitated the operation of the plant – There were many examples in the evidence of KAS and Metro sharing decision-making regarding

KAS employees – Certificate issued to the applicant – KAS and Metro declared a single employer

METRO WASTE PAPER RECOVERY INC. C.O.B. METRO MUNICIPAL RECYCLING SERVICES INC.; RE TEAMSTERS LOCAL UNION NO. 419; RE THE K.A.S. GROUP OF COMPANIES INC. 911

Related Employer – Collective Agreement – Grievance – Termination – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl Canada brought a motion to have the s. 1(4) application dismissed – A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

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IUPAT; RE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., ET AL 1018

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INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) 826

Representation Vote – Certification – Construction Industry – Employee Status – Membership Evidence – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental mis-representation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486.. 936

Sale of a Business – Certification – Construction Industry – CCWU applied to certify the employees of YYZed – Local 183 also filed an application for certification but equally asserted that there was a sale of a business from Weston to YYZed (Weston and Local 183 were signatories to a collective agreement) – Weston was a corporation incorporated by four individuals who developed a series of high-rise residential projects (each separately incorporated) – After the completion of Weston, the partners went their separate ways and one subsequently incorporated YYZed to develop a new property –

The Board held that a key figure may sometimes suggest a relationship or continuity of businesses but in this case the individual in question did not represent the essence or personification of Weston in order for the sale of business application to succeed – Sale of business application dismissed; Local 183's application for certification dismissed – CCWU's application succeeds; parties directed to file submissions on appropriate bargaining unit

2043102 ONTARIO LIMITED O/A YYZed PROJECT MANAGEMENT; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE LIUNA, LOCAL 183 783

Sale of a Business – Construction Industry – Judicial Review – Related Employer – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – On judicial review, concerning the single employer application, the court noted there was no identity of existence between the pre- and post-amalgamation corporations, something contemplated by the Amalgamation Agreement and the *Business Corporations Act* – The Board's decision not to exercise its discretion to grant the relief requested was reasonable – The Court also found the Board's finding that there was no sale of business at any time was reasonable – Application dismissed

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OTTAWA-CARLETON PUBLIC EMPLOYEES UNION (CUPE), LOCAL 503; RE CITY OF OTTAWA; ET AL 1020

Sector Determination – Bargaining Rights – Applicants sought a determination under s. 166 as to whether or not the Thorold Project properly fell under the ICI or the electrical power systems sector of the construction industry – The Thorold Project involved the construction of a Co-Generation facility that would generate steam to be used in the operation of the paper mill and in the production of electrical power – After reviewing the Board's history of dealing with the line between the ICI and EPS sectors, the Board considered the end use of the construction, the work characteristics of the project, and the bargaining patterns of the parties on this and similar projects – The Board found that there were two end uses for the facility, to produce steam for use both in paper making (ICI) and the generation of electricity (EPS), neither of which was predominant – The Board found that there were no work characteristics which distinguished the Project overall from those in the ICI or EPS sectors – Finally, the Board noted that the vast majority of similar types of projects had previously been built using Provincial Collective Agreements in the ICI Sector – For these types of projects, there was no new or different bargaining structure created by the parties – Since the first two factors were inconclusive regarding sector, the bargaining pattern was determinative – The Board held that the Thorold Project fell within the ICI sector of the construction industry

V.K. MASON CONSTRUCTION CO., ET AL; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, ET AL; RE LIUNA 985

Settlement – Construction Industry Grievance – The employer sought a declaration that it was not required to apply the terms and conditions of the collective agreement between the applicant and the contractors association to which the employer belonged (the "High Rise Agreement") – The Board found that through a series of earlier applications, including an accreditation and minutes of settlement in a related employer file, the employer became bound to the "Low Rise Agreement" – One of the provisions of the latter agreement required the employer to apply the terms of the High Rise Agreement if its employees performed work on a building captured by that agreement (the "cross-over" clause) – Finding the accreditation irrelevant to the issue before it, the Board held that the employer's signing of the Low Rise Agreement bound the employer to all of its provisions, and one of those provisions required that the employer apply the terms and conditions of the High Rise Agreement in appropriate circumstances – Motion dismissed; matter referred to Manager of Field Services

WASAGA TRIM SUPPLY (2006) INC.; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA; RE THE TRIM ASSOCIATION OF ONTARIO 1012

Termination – Collective Agreement – Grievance – Related Employer – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl Canada brought a motion to have the s. 1(4) application dismissed – A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

BUNZL CANADA INC., 1456944 ONTARIO INC., BUNZL DISTRIBUTION INC., MORGAN SCOTT INC., 1547296 ONTARIO INC. AND 1705375 ONTARIO INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA LOCAL 175 795

Unfair Labour Practice – Estoppel – Schneider's Employee Association brought a complaint that Maple Leaf had violated s. 70 of the Act by failing to provide the Association with the names of employees in receipt of weekly indemnity benefits – The employer brought a preliminary motion for dismissal of the application on the basis of issue estoppel, since the matter had already been decided by an arbitrator – The Board found that the arbitrator had correctly recognized his lack of jurisdiction to decide the issue, since it arose from a breach of the Act rather than a substantive provision in the collective agreement; the arbitrator's "in the alternative" opinion or *obiter dicta* was not dispositive of the complaint – The Board held that it had an obligation to ensure the protection of the rights granted by the Act, and as such had exclusive jurisdiction where a consideration of policy issues was required – The motion for dismissal was denied – Matter set down for hearing

MAPLE LEAF CONSUMER FOODS INC.; RE SCHNEIDER'S EMPLOYEES ASSOCIATION 904

0561-08-R; 1286-08-R; 1519-08-R Canadian Construction Workers' Union, Applicant v. **2043102 Ontario Limited o/a YYZed Project Management**, Responding Party v. Universal Workers Union, Labourers' International Union of North America, Local 183, Intervenor; Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. 2043102 Ontario Limited o/a YYZed Project Management and/or Weston on the Humber Inc., Responding Parties v. Canadian Construction Workers' Union, Intervenor; Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. Weston on the Humber Inc. and 2043102 Ontario Limited o/a YYZed Project Management, Responding Parties v. Canadian Construction Workers' Union, Intervenor

Certification – Construction Industry – Sale of a Business – CCWU applied to certify the employees of YYZed – Local 183 also filed an application for certification but equally asserted that there was a sale of a business from Weston to YYZed (Weston and Local 183 were signatories to a collective agreement) – Weston was a corporation incorporated by four individuals who developed a series of high-rise residential projects (each separately incorporated) – After the completion of Weston, the partners went their separate ways and one subsequently incorporated YYZed to develop a new property – The Board held that a key figure may sometimes suggest a relationship or continuity of businesses but in this case the individual in question did not represent the essence or personification of Weston in order for the sale of business application to succeed – Sale of business application dismissed; Local 183's application for certification dismissed – CCWU's application succeeds; parties directed to file submissions on appropriate bargaining unit

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Eric Comartin* and *Antonio Dionisio* for Canadian Construction Workers' Union; *Christopher Little* and *Sam DiPasquale* for 2043102 Ontario Limited o/a YYZed Project Management; *Sean McFarling, Doug Serroul* and *Calvin Bolger* for Labourers, Local 183.

DECISION OF THE BOARD: November 16, 2009

Introduction

1. Board File No. 1519-08-R is an application for a declaration that there has been a sale of business between Weston on the Humber Inc. ("Weston") and 2043102 Ontario Limited o/a YYZed Project Management ("YYZ"). The applicant, Universal Workers Union, Labourers' International Union of North America Local 183 ("Local 183") filed this application originally under subsection 1(4) and section 69, but abandoned its request for relief under subsection 1(4) during argument.

2. The odd feature of this case is that both Local 183 and YYZ assert that there has been a sale from Weston to YYZ which binds YYZ to the collective agreement that was binding on Weston, i.e. the collective agreement between the Metropolitan Toronto Apartment Builders Association and Local 183. They are opposed in this by the Canadian Construction Workers' Union ("CCWU"). The CCWU filed an application for certification on May 16, 2008. On July 22, 2008 Local 183 filed its application for certification (Board File No. 0561-08-R), and finally on August 14, 2008 filed this application under section 69 (Board File No. 1519-08-R). Initially YYZ opposed all three

applications, but later made common cause with Local 183 with respect to the sale of business application. If the application succeeds, then the CCWU's application for certification will be dismissed as untimely.

3. There are two issues: first, whether there has been a sale from Weston to YYZ and second, whether Local 183 has abandoned, not its bargaining rights for employees of Weston, but its right to bring an application under section 69 against YYZ. Because of my decision on the first issue, it is unnecessary to decide the second. I find there has been no sale of business.

Facts

4. Briefly, the general outline of the facts are as follows. Weston was a corporation incorporated by a partnership of four individuals who were engaged in the development and building of high-rise residential projects. The partnership incorporated a separate corporation for each project. The four partners included Sam Di Pasquale, who subsequently became the sole principal of YYZ. The last project built by the partnership was the Weston building. During and after this project, the partners went their separate ways. Sam Di Pasquale created YYZ as a vehicle for the development and building of a four or five-storey building in Port Perry, Ontario. Although he sought subcontractors, and possibly employees from Local 183, Labourers Local 506 and Carpenters Local 397, he was unsuccessful in that regard. Ultimately, the forming subcontract was taken up by a company called Durocast (which is the subject of a separate dispute between the CCWU and Local 183). YYZ also hired some labourers, leading to these applications.

Legal Context

5. The basis of Local 183's case is that the business, or part of the business of Weston was the skills, contacts and entrepreneurial activity of Sam Di Pasquale. In acquiring the "human asset" of Sam Di Pasquale, YYZ acquired part of the business of Weston.

6. The concept of a sale of business has never, in the Board's consideration, been tied to particular assets or processes. What makes up the essence of a particular business will vary from case to case. All sale of business cases depend on their facts. Generally, as the Board said in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at para. 30:

> 30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

And again in *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. Apr. 281 at para. 54:

> 54. A "*business*" is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market; and, over the years, the Board has come to what might be described as an "operational" or "instrumental" interpretation of that term. In *St. Leonard's*

Society of Metropolitan Toronto, [1993] OLRB Rep. Jan. 56, the Board put it this way:

> The Board's conception of the "business" under the *Labour Relations Act* is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets, nor the body of work in which employees may be engaged from time to time. It is a delivery system, an economic vehicle, an organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.

7. In the construction industry, this concept can be more elusive because of the lack of permanence of the work of the business or of the employees who perform that work. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 (although in a context of an application under subsection 1(4) rather than an analysis under section 69) the Board said at paragraph 13:

> 13. A business may be effectively transferred from one corporate entity to another, without any of the indicia of a 'transfer of a business' which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. …

8. On occasion, the Board has found a single individual to be the essence or the personification of the business. It is not enough, however, simply to say that the first business was one in the construction industry and the individual identified had an ownership stake in that business. It is necessary for a party asserting such a proposition to demonstrate that the individual was in some sense the personification of the business (e.g. *Ian Somerville Construction Ltd.*, [1988] OLRB Rep. Oct. 1022) or of some significant part of the business (e.g. *X-L Air Energy Services Ltd.*, (Sept. 1, 2006, unreported; [2006] OLRD 3204). This task becomes more difficult when there is more than one person or family in control of the first business. Sometimes all of the principals of the company are equally a personification of the business (e.g. *Base Electric Ltd.*, [1978] OLRB Rep. Feb. 140). On occasion, one person, though an officer and director of the corporation and someone with some part in the business is not really so identified with the business that his or her departure to another company reflects a sale of any essential element of the business (e.g. *Rivard Mechanical*, [1981] OLRB Rep. May 550). Indeed, even a key figure may leave a business without actually taking any

significant part of that business with him (e.g. *Tri-Corps Industrial Contractors*, [1994] OLRB Rep. Oct. 1446).

9. The factual question then when an applicant union points to an individual as the key element of the business that has been transferred into a new corporate vehicle, is whether the individual is the personification or essence of the business or a significant portion of it. This is simply a question of fact. In this case, I find that Mr. Sam Di Pasquale was not.

10. Mr. Di Pasquale was one of four partners. Each of the partners had been working together in the partnership on one project after another for seven or eight years. The exact number of projects was not indicated. The Weston project was active from 2005 to 2007. Each of the four partners had a specific role: financing, marketing and sales, day-to-day site activity, and project administration. Project administration involved the negotiation and administration of contracts with suppliers and subcontractors. This last function was the one that Mr. Di Pasquale fulfilled. Mr. Di Pasquale was involved in the actual construction work, but did not control that part of the business exclusively, and did not have responsibility for labour relations issues involving the employees of subcontractors, or any employees of Weston. He did however negotiate the collective agreement and Minutes of Settlement referred to below with Local 183.

11. The financial component of the business was clearly regarded as the most important from a business point of view. The financial partner held a fifty-five percent share of the business. There was no evidence as to the division of the remaining shares among the other three partners. Mr. Di Pasquale could have had one percent or could have had forty-three percent of the shares or indeed anything in between.

12. Even within his sphere of operations, he did not act autonomously. All bids for subcontracts had to be approved by all four partners. Decisions were made on a consensus basis and ninety percent of his recommendations were accepted. That figure is very high, but does indicate that he had no independent authority in the area and on occasion, was overruled by his partners.

13. Local 183 suggests that Mr. Di Pasquale decided during the course of the Weston project to leave, and that once he left, Weston, or rather the Weston partnership, ceased to operate. What little evidence there is suggests a different conclusion. Since the financial partner had a fifty-five percent share of the partnership, he appears to be the most significant of the four players. Certainly, construction projects need money, and often a great deal of it, although Mr. Di Pasquale was able to obtain financing for a more modest project in Port Perry, with a different business arrangement. However, during the course of the Weston project, the financial partner left the business. He was replaced by an individual described only as "an engineer", which I take to mean that he was not someone with financial connections. The disproportionate share of the partnership suggests that the financial partner might have been contributing more substantially to the business and that it was his departure that made it no longer viable, but the Board has no way of knowing. Mr. Di Pasquale was not asked about this in any detail, and no other evidence was led.

14. Even the little evidence I have from Mr. Di Pasquale is problematic. When asked in cross-examination why YYZ had changed its position from opposition to the related employer/sale of business application to a written agreement conceding that section 69 applied, Mr. Di Pasquale replied: "I don't remember". The matter was not followed up in cross-examination, but I find it very difficult to give any credence to that statement. While the motivation of a party involved in litigation

to make or change a position is likely only to be of limited value, his evasiveness in responding to the question makes it difficult to place much reliance on even the evidence I do have from Mr. Di Pasquale.

15. There is simply no evidence that Mr. Di Pasquale's departure put an end to the Weston partnership. The financial partner left first, before Local 183 filed or succeeded in its certification application for employees of Weston. When Mr. Di Pasquale and a representative of Local 183 sat down to negotiate, Mr. Di Pasquale was aware that the remaining partners in the Weston partnership were planning to go their separate ways. No one asked him about the reasons or timing of the break-up. On the little evidence I have, I can only conclude that the triggering factor was the financial partner's departure, not Mr. Di Pasquale.

16. In 2005, following a certification of Local 183 as bargaining agent for employees of Weston, the Union and Mr. Di Pasquale negotiated an agreement. Essentially, the agreement was to be bound to the MTABA agreement while waiving existing subcontracts on that job. The Minutes of Settlement contain the following at paragraph 5:

> The Union understands that there are four partners who carry on the business of Weston on the Humber Inc., and that one of these partners may not be able to successfully operate the business alone without the others' work efforts and contributions to the business.

(The engineer who replaced the financial partner was the fourth signatory.) The only evidence as to what discussions surrounded the negotiation of this part of the Minutes of Settlement came from Mr. Di Pasquale, who said that the discussions that led to paragraph 5 were that: "We would be doing other business in the future apart from one another ... We knew we were separating after this [Weston]". The Minutes of Settlement were signed by all four partners. I heard no evidence from the representative of Local 183 who negotiated the Minutes.

17. For the purpose of analyzing whether or not a sale occurred, this paragraph is of some significance. Local 183 argued that the paragraph meant simply that there might have been more than one key person in the business. Since I have absolutely no context into which to place that paragraph, I am left only with the words on the page. It seems to me obvious that the words were inserted because both parties realized that the corporation which was the only party with which Local 183 had any bargaining rights was not likely to carry on business in the future. The words as written suggest to me that the business involves a combination of some or all of the partners and that in the absence of at least some of those partners, the business might not be able to function. That is, the "economic vehicle" the Board has described in cases quoted above would cease to exist.

18. I do not accept the CCWU's argument that it constitutes an acknowledgement by Local 183 that it may not pursue bargaining rights with alleged successor employers. Whether an application under subsection 1(4) would have been successful had no application for certification been filed by the CCWU is not an issue before me. Paragraph 5 of the Minutes of Settlement does not say that one of the partners may not be able to carry on "a business" alone, it says they may not be able to carry on "the business". If anything, this use of the definite article suggests that the essence of the business lies in the combined talents and synergies of the four partners. Obviously, all four of them were able to function outside the partnership in some fashion; they were clearly all four business people who brought their particular talents to the partnership. Again an application under subsection

1(4) is not before me. However, "the business" for which Local 183 had bargaining rights was a combination of the four of them, not some of each of the contributions of each of the four partners.

19. Accordingly, I cannot conclude that Mr. Di Pasquale represented the essence or the personification of the business of Weston. There is simply no evidence that would allow me to come to that conclusion. Local 183 argued that since the employer, YYZ, agreed with the application, somehow the onus shifted to the CCWU. I do not accept that argument. The onus started with and remains with Labourers Local 183. The evidence simply does not allow me to come to the conclusion that Sam Di Pasquale was the personification of or the essence of some significant part of the business of Weston such that his setting up of the new business constitutes the sale of the business for the purposes of section 69.

20. As a result of this conclusion, the second issue raised by the CCWU need not be dealt with. This application is dismissed.

21. In Board File 0561-08-R, the parties agreed that a certificate would issue to the CCWU subject to the Board's finding that the CCWU has status as a trade union under subsection 1(1) and subsection 126(1) and subject to the final determination of the bargaining unit. It would also seem to me that as a consequence, Board File 1519-08-R, being the application for certification by Local 183, would be dismissed as untimely. Accordingly, I direct the parties to make their submissions in writing as to the appropriate bargaining unit in Board File 0561-08-R and any other submissions they believe are relevant. If possible, I will make a final decision with respect to both of the applications for certification on the basis of the written submissions.

2041-08-JD Communications, Energy and Paperworkers of Canada, Local 92, Applicant v. **AbitibiBowater Canada Inc.** and the International Association of Machinists and Aerospace Workers, Lodge 771, Responding Parties

Jurisdictional Dispute – CEP, Local 92 challenged the decision of the employer, AbitibiBowater Canada Inc, which assigned work to IAM that involved the operation of a front end loader and fork lift for the purposes of moving biomass fuel – The Board considered the usual factors and held that both unions could claim the work in question under their collective agreements, that they both had operated similar machinery and thus both possessed the required skill set to do the work, so these factors were indeterminative – However, the Board acknowledged that safety, economy and efficiency, and employer preference all favoured IAM – IAM workers had particular and unique knowledge of the Biomass Boiler system that allowed them to make appropriate decisions in event of difficulties – Due to its relative proximity to the site, IAM workers were available on a 24/7 basis as required, while CEP workers were not, since their yard only operated during the day – The employer preference to use IAM was grounded in valid labour relations or operational concerns, since if it was required to use CEP employees to perform the work, they would have to hire 5 more employees to cover all the required shifts, and there would be no duties for these employees half the time

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Laurie Kent, George Chabot, Larry Kellar* and *Scott McPherson* appeared on behalf of the Communications, Energy and Paperworkers Union of Canada, Local 92; *Peter Thorup, Dave Berny* and *Kent Seguin* appeared on behalf of AbitibiBowater Canada Inc.; *Stephen Krashinsky, Herman Pryus* and *Keith Keller* appeared on behalf of the International Association of Machinists and Aerospace Workers, Lodge 771.

DECISION OF THE BOARD: December 16, 2009

1. This is a jurisdictional dispute application under section 99 of the *Labour Relations Act, 1995*. The Communications, Energy and Paperworkers Union of Canada, Local 92 ("CEP, Local 92") challenges the assignment by Abititibowater Canada Inc. (the "employer") at its Fort Frances Mill of the work of operating a front end loader and fork lift performed by the "Biomass Feed Operator" to members of the International Association of Machinists and Aerospace Workers, Lodge 771 ("IAM").

Factual Background

2. The employer operates a pulp and paper mill complex in Fort Frances. The mill is comprised of many buildings spread over a large area. There are four bargaining units of employees at the mill. CEP, Local 92 represents approximately 230 active employees. IAM represents approximately 150 active employees. There is no suggestion that the other two bargaining units, comprising a total of approximately a further 150 employees are relevant to this dispute.

3. The mill has had a natural gas fired Co-Generation plant on site since 1991 which supplies steam to the paper mill. The mill also purchases hydro. The costs of natural gas and hydro are volatile and significant. In order to improve overall costs, the employer decided to build a Biomass Boiler at the mill for the production of steam and electricity. This involved an expenditure of in excess of $70 million. Construction was completed in 2008 and start up of the Boiler and Fuel Handling system commenced in 2009.

4. The Biomass Boiler burns organic material consisting of bark, slash (tops of trees), sawdust, sludge and pellets. This material is fed onto a conveyor belt by a feeder system below the "reclaim pile" in the "Reclaim Area". Moving the organic material onto the reclaim pile involves use by the Biomass Feed Operator of a front end loader. Excess material is directed to storage piles in the Storage Area from which it is moved to the Reclaim Area as needed by the Biomass Field Operator using the front end loader.

5. Bark is a waste product from the wood rooms at the Paper Mill and Kraft Mill. There is a "bark line", or conveyor belt, which is designed to move bark from the wood rooms to the reclaim area or storage piles. At the time of the hearing, the bark line had been damaged with the result that movement of material from the wood rooms to these areas was being accomplished by trucks loaded by a front end loader operated by members of CEP, Local 92. Once the bark line is repaired, this function will no longer be performed.

6. Other organic matter, consisting of bark, slash and sawdust, comes from wood lots by truck. It is dumped by the trucks onto a conveyor belt system which transports it to a hog mill where it is ground up and then moved by another conveyor belt system to the Reclaim Area or the storage piles.

7. "Agricultural pellets are also used as fuel. They are dropped in an area in the Storage Area and moved by the Biomass Field Operator to the Reclaim Area as needed using the front end loader.

8. Bark, slash, sawdust, sludge and pellets all have different fuel characteristics and different, and variable, moisture content. Proper operation of the Biomass Boiler requires that these various components be "mixed" in order to achieve proper fuel characteristics. This task is accomplished by the Biomass Field Operator using the front end loader.

9. While using the front end loader, the Biomass Field Operator is in communication with the Biomass Boiler operator, a position referred to as the Load Operator 2. This is accomplished by radio communication. In addition, the front end loader is equipped with a "Bailey Screen", which is a computer monitor which displays, among other things, the operational status of the various conveyor belts, moisture content in the fuel feed to the Biomass Boiler and the operational status of the boiler itself.

10. A Biomass Field Operator also uses a fork lift to empty a bin in which wet ash from the boiler collects. The bin is emptied two to three times per shift. This function was originally assigned to members of CEP, Local 92. The employer asserts that this was done on an interim basis until training of IAM members on the use of the fork lift was completed and a dedicated fork lift was received. Members of the CEP, Local 92 executive deny that they were advised that this was a temporary assignment.

11. The Biomass Boiler operates 24 hours per day, seven days a week. As of the date of the application, there were two Biomass Field Operators per shift, 24 hours per day, seven days a week and the time spent operating the front end loader was equivalent to about 60 per cent of the time of one Biomass Field Operator. When the bark line is operational again, the employer projects that this will fall to about 40 per cent of the time of one Biomass Field Operator. The time spent on the front end loader for this purpose is not continuous but somewhat randomly distributed through the course of each shift. The remainder of the Biomass Field Operators' time is spent performing other functions related to the various fuel conveyor belts, truck dumper and the Biomass Boiler.

12. The employer's operations are organized into a variety of departments with a Line of Progression (LOP) for employees in the department. Employees in a LOP are trained in other positions in that LOP so that absences may be covered and vacancies filled by existing staff. Employees in each LOP fall within only one bargaining unit.

13. The employer considers the movement of the biomass fuel by the Biomass Fuel Operator to be an important part of the fuel handling system which is itself an integral part of the Biomass Boiler system. Employees operating the Biomass Boiler are part of the Recovery Department. The Biomass Fuel Operator is, thus, part of the Recovery LOP. The Recovery LOP falls within the IAM bargaining unit. There is no dispute that all other positions in the Recovery LOP properly fall within the IAM bargaining unit.

14. Performance of other of the duties assigned to the Biomass Fuel Operator requires certification in boiler operation under the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16 (which repealed and replaced the *Operating Engineers Act*, referenced by the parties during the hearing) and Regulations thereto. The employer does not assert that the operation of the front end

loader requires such certification. However, Biomass Fuel Operators gain qualifying time under the *TSSA* and Regulations and gain higher levels of certification as they progress through the Recovery LOP.

Analysis

15. The parties organized their submissions in relation to the list of factor the Board has developed for the resolution of jurisdictional disputes in the construction industry. They are:

> (a) collective bargaining relationships;
> (b) skill and training;
> (c) safety;
> (d) economy and efficiency;
> (e) employer past practice;
> (f) area or industry practice; and
> (g) employer preference.

I note that even within the construction industry the Board has said that these factors are not to be applied mechanically. Further, in my view, careful consideration needs to be given to their applicability to disputes in non-construction settings.

Collective Bargaining Relationships

16. CEP, Local 92 has the following recognition clause in its collective agreement with the employer:

> 201 Recognition
>
> 201.1 The Union is recognized as the exclusive bargaining agent of the employees in the classifications listed in Appendix "A" to this agreement.
>
> The **work** currently being performed by the employees in the classifications covered by Appendix "A" of this Agreement comes under the **exclusive jurisdiction** of the Local Union.

CEP, Local 92 relies upon the emphasized words.

17. CEP, Local 92 argues that it has sole and exclusive jurisdiction for the operation of equipment such as front end loaders for the purposes of moving any wood product or by-product at the mill, including bark. It argues that this is the "work" that its members have done at the mill for years. It accepts that members of the IAM operate, and have operated, equipment such as front end loaders at the mill, but argues that the distinction is that the operation of that equipment has not been in relation to wood product or by-products of the mill.

18. The employer argues that the front end loader is being used not simply in relation to wood by-products of the mill, but also to mix that by-product with other biomass to create the fuel feed for the biomass boiler. CEP, Local 92, it argues, cannot claim to have performed that kind of work in the past. In any event it argues that the manner in which jurisdiction between CEP, Local 92 and the

IAM has been divided in the past has been by reference to whole processes. For example, the CEP, Local 92 has jurisdiction with respect to the conveyor belts within the mills operated by its members.

19. IAM relies on Article 301.1(b) of its collective agreement with the employer which gives it jurisdiction over all "operation of all machines in connection" with the power houses and Article 301.3 which gives it jurisdiction over "operating ... Waste Bark Fired Boilers ... and all related equipment to the aforementioned operations". Thus, it argues that it has jurisdiction over the work in question.

20. CEP, Local 92 relies upon *A.A.H.P.O. v. O.N.A.*, [1996] O.L.R.B. Rep. Jan 28 and *Glebe Centre Inc. v. O.N.A.*, [2008] O.L.R.B. Rep. March/April 266 (March 18, 2008). I do not find either case to be of assistance. The work in dispute in those cases was existing work which had been re-assigned from one bargaining unit to another. Both cases relied upon job protection clauses in the collective agreement applicable to the bargaining unit from which the work had been re-assigned to find in favour of the affected union. In this case, by contrast, the position and work in question are new.

21. CEP, Local 92 cites paragraph 19 of *Toronto Star Newspaper Ltd. v. G.A.U. Local 35*, [1980] O.L.R.B. Rep. Apr. 565 for the proposition that the Board must look at the nature of the work done, not the use made of the end product. As I understand its argument, CEP, Local 92 asserts that this proposition applies to the determination of whether or not both unions can claim jurisdiction to the work pursuant to the terms of their respective collective agreements in order to give rise to conflicting claims as a basis for a jurisdictional dispute.

22. With respect, I am unable to agree that *Toronto Star* stands for this proposition. In that case, there was no question that the provisions of the relevant collective agreements gave rise to conflicting claims for jurisdiction: see paragraph 1 of the decision. Further, the dispute in question was between two craft unions. It was within that context that the Board stated at paragraph 19 of the decision:

> [T]he Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft". When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are most closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product, these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

These comments were not directed to the issue in this case of whether both unions can assert a claim to having jurisdiction over the work in question. Further, as discussed below, this dispute does not arise as a result of claims of competing trades or craft. Thus, the comments in *Toronto Star* have limited relevance to the application of the other factors to determining the jurisdictional dispute that does exist between the parties in this case.

23. I am satisfied that both CEP, Local 92 and IAM can claim the work pursuant to their collective agreements. The operation of front end loaders to move wood by-products of the mill is work that was, as of the date that it entered into its current collective agreement with the employer, performed by CEP, Local 92 members. On the other hand, in this instance the operation of the front end loader to move the wood by-products of the mill is clearly done in connection with the operation of the power houses, and in particular the waste bark fired boilers which are part of the Biomass Boiler system. As such, the work also falls within the jurisdiction of the IAM as described in its current collective agreement with the employer. In the result, I reject CEP, Local 92's claim that it has exclusive jurisdiction with respect to the work in question.

24. As a factor for determining this jurisdictional dispute, collective bargaining relationships are neutral.

Skill and Training and Safety

25. It is convenient to deal with the factor of skill and training and the factor of safety together.

26. In my view, the factor of skill and training is of limited assistance within the context of this case. As noted, this, and the other traditional factors emerge from jurisdictional disputes in the construction industry. In the construction industry, bargaining rights are defined by reference to trades that have more or less unique sets of skills. These trades, in turn, are members of the union that typically has a function in supplying labour through a hiring hall.

27. In this case, CEP, Local 92's bargaining unit is not a craft unit. While IAM arguably has a craft unit, covering a number of trades and notably, for the purposes of this decision, positions requiring certification under the *TSSA* and Regulations thereto, the work in question does not relate to the exercise of any such craft. Both CEP, Local 92 members and IAM members operate fork lifts. Further, while CEP, Local 92 members operate front end loaders and other mobile heavy equipment at the mill, IAM members operate a swing loader (apart, of course, from the work in dispute). A swing loader is similar to a front end loader except that it has the additional capacity of a rotating boom.

28. Thus, while the criteria of skill and training might be of assistance in a non-construction setting, where bargaining rights were based on trades, craft units or in some other manner defined with reference to uniquely skilled job positions, it is of limited assistance in this case.

29. I do note that in this instance it is arguable that skill and training relate not simply to the operation of the front end loader, but to the function of mixing and inputting the fuel into the Biomass Boiler system of which the fuel handling system is an integral part. While I accept CEP, Local 92's argument that little skill is required for the gross level of mixing involved and that the Biomass Field Operator often operates under the direction of the Load Operator 2 with respect to this work, I also accept the arguments of the employer and IAM that a knowledge of the overall Biomass Boiler system is desirable.

30. It seems to me, however, that this knowledge relates more to the factor of safety: knowledge of the Biomass Boiler system permits the Biomass Field Operator to make appropriate decisions based on information provided by the Bailey Screen without having to be told by the Load Operator 2. Thus, while I find the factor of skill and ability to be neutral, the factor of safety favours IAM.

Economy and Efficiency

31. Operation of the fork lift involves a relatively small amount of time. Operation of the front end loader occupied the equivalent of 60% of the time of one of the Biomass Field Operators at the time of the application. When the bark line is repaired, it is projected that it will occupy only 40% of the time of one Operator. I accept the employer's submission that the times at which the front end loader must be used are randomly distributed through the day. While CEP, Local 92 argues that its members in the mill complex are available to perform this work, I accept the employer's submission that those employees are fully occupied and some distance away and that in any event, to the extent that the "yard" is relied upon as a source of CEP, Local 92 members to perform the work, since it operates only during the day, those CEP, Local 92 members would not be available on the 24 hour / 7 days a week basis required.

32. Further, the current allocation of work means that the Biomass Field Operator is available and able to perform other work related to the Biomass Boiler system. The front end loader and fork lift work is naturally integrated into the balance of this work. To focus on the front end loader and fork lift duties as a discrete piece of work which might be assigned to a different bargaining unit is to ignore the reality of an industrial work place. Unlike a typical construction work site, employees cannot be hired or laid off on mere hours notice as required to perform work as necessary. Considerations of economy and efficiency will thus often be paramount in a jurisdictional dispute with respect to an industrial setting, and in any event are in this case. The factor of economy and efficiency clearly favours IAM.

Employer Past Practice

33. CEP, Local 92 argues that historically the employer's practice has been to assign all work related to the movement of wood and wood by-products to its members. The difficulty with this argument, however, is that, as discussed above, the biomass fuel which is being moved is not limited to wood products and by-products. Thus, this factor only slightly favours CEP, Local 92.

Area or Industry Practice

34. In its brief, CEP, Local 92 stated:

> This is not a jurisdictional dispute in the construction industry where the disputing trades are bound by construction industry collective agreements. It is this factor that makes industry and area practice relevant in construction industry jurisdiction disputes.
>
> The employment environment in non-construction industry jurisdictional disputes is determined in accordance with the specific workplace collective agreements only. At other work locations for other employers different

> collective agreements and different trade unions are involved. Area Practice is irrelevant.

I am inclined to agree with this statement, and in this respect note that neither the IAM nor the employer took issue with it in their reply briefs. However, given the view I take of this matter it is not necessary to decide the issue.

Employer Preference

35. Employer preference is for the IAM. To be given weight, its preference must be grounded in valid labour relations or operational concerns. I am satisfied that employer preference is so grounded in this case. The employer points out that if it was required to use CEP, Local 92 members to perform the front end loader, and fork lift, duties currently performed by the Biomass Field Operator, it would be required to hire 5 more employees to cover all of the required shifts and that for approximately half the time these employees would have no duties to perform. This factor strongly favours continued assignment of the work to the IAM.

Conclusion

36. The factors of collective bargaining relationships and skill and training are neutral. Employer past practice slightly favours assignment of the work to CEP, Local 92. Safety, however, favours assignment of the work to the IAM and economy and efficiency and employer preference strongly favour assignment of the work to IAM.

37. For all of the foregoing reasons, I decline to disturb the assignment of the work to the IAM.

0230-07-R; 1546-09-R United Food and Commercial Workers Canada, Local 175, Applicant v. **Bunzl Canada Inc.,** 1456944 Ontario Inc., Bunzl Distribution Inc., Morgan Scott Inc., 1547296 Ontario Inc. and 1705375 Ontario Inc., Responding Parties; Glen Pilgrim & a group of employees of Morgan Scott, Applicants v. United Food and Commercial Workers Canada Locals 175 and 633, Responding Parties v. Morgan Scott Partnership, Intervenor

Collective Agreement – Grievance – Related Employer – Termination – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl Canada brought a motion to have the s. 1(4) application dismissed

– A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

BEFORE: *Brian McLean*, Vice-Chair, and Board Members *R. O'Connor* and *S. McManus*.

APPEARANCES: *John R. Evans, Joe DeMelo* and *Neil Keating* for the United Food and Commercial Workers Canada, Local 175; *Glen Pilgrim* appearing on his own behalf; *Michael Kennedy, Dan Lett, Rick Jaudes, John Howleit* for the responding parties.

DECISION OF VICE-CHAIR BRIAN MCLEAN AND BOARD MEMBER RICHARD O'CONNOR; November 18, 2009

1. Board File No. 0230-07-R is an application under section 1(4) and/or section 69 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") (the "related employer application"). Board File No. 1546-09-R is an application for termination of bargaining rights. The Board held a hearing on September 17, 2009 to receive the arguments of the parties regarding a motion made by the employer that the related employer application be dismissed without a hearing.

2. The facts which give rise to the employer's motion are quite unusual and are as follows.

3. Bunzl Canada Inc. is a food packaging material warehousing and distributing company. It has a location in Oakville at which approximately 29 bargaining unit employees have for some time been represented by the applicant.

4. The collective agreement between Bunzl and the union has the following recognition provision:

> ARTICLE 1 – RECOGNITION
>
> 1.01 All employees of the Respondent in the Province of Ontario, save and except forepersons, persons above the rank of forepersons, office, clerical and sales staff.
>
> Note: Location of Facility: 2130 South Service Road, Oakville, Ontario
>
> LETTER OF AGREEMENT
>
> REGARDING: ARTICLE 1 – RECOGNITION
>
> If Bunzl Canada Inc. otherwise known as Lilo, moves its operations outside of its present Oakville location anywhere in the province of Ontario during the term of this Agreement with Local 175, it would recognize Local 175 as its bargaining representatives for Drivers and Warehouse persons. All existing employees in the Bargaining unit shall be offered employment at the new facility without loss of

> seniority of benefits, and the collective agreement shall apply at the new facility.

5. In July or August 2006 Bunzl USA purchased the responding party Morgan Scott which is also a warehousing/distribution company which owns Bunzl Distribution Inc.. Morgan Scott had locations in Mississauga and Kingston. Morgan Scott was a non-union company. Following the transaction Morgan Scott remained a separate corporation from Bunzl Canada Inc.

6. Relying on Article 1.01 of its collective agreement with Bunzl Canada Inc. the union filed a grievance asserting that it had province wide bargaining rights for Bunzl Canada Inc. which pertained to the newly purchased Morgan Scott business. Later it filed this application and adjourned the arbitration hearing before Arbitrator Jesin.

7. In November 2007, at the commencement of the first day of the hearing of this matter, the union sought an adjournment of its s. 1(4) application pending the outcome of the arbitration hearing with respect to its grievance. Over the objections of the employer the Board granted the adjournment.

8. The matter proceeded to arbitration. In the meantime, on or about February 11, 2008 the union applied for certification of the following bargaining unit at the Morgan Scott facility in Mississauga:

> all employees of Morgan Scott Partnership, located in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.

9. In its cover letter to the application for certification the union stated that the application was being made "without prejudice to the position of UFCW Local 175 in an outstanding arbitration case (recognition rights) and Labour Board related employer proceeding known as Board File No. 0230-07-R including Bunzl Canada Inc.".

10. The union was successful in the representation vote at Morgan Scott in Mississauga and was certified by the Board by decision dated March 7, 2008. The union gave notice to bargain and the parties commenced bargaining a collective agreement.

11. The parties bargained for a considerable period of time and concurrently proceeded with the arbitration hearing. Eventually the employer tabled a final offer which was rejected by the employees. Bargaining was at an impasse. We are not aware of any application alleging bad faith bargaining by the employer.

12. In the meantime, in February 2009, Arbitrator Jesin issued his award. He found that Article 1.01 gave the union province-wide bargaining rights. However, he also found at p. 24 (I note that what he refers to as the Lilo facility is the Bunzl facility):

> In other words, Article 1.01 would require the Employer to recognize the Union for employees employed in a newly acquired facility. However it would not apply the remaining terms of the agreement to that facility. *Instead, Article 1.01 would require the parties to negotiate new terms and conditions of employment to be applied at said new facility. Under this*

> *interpretation, recognition is provided for all employees throughout Ontario, save for the exclusions indicated Article 1.01. However, the remaining provisions of the agreement only apply to the Lilo facility.*
>
> This interpretation of Article 1.01 is drawn from the presence of the note indicating the location of the Lilo facility and from the wording of the amended movement protection letter. The movement protection ensures that the terms of the agreement are applied to the Lilo facility throughout Ontario. This letter becomes necessary under this interpretation of Article 1.01. At the same time, the increased scope in Article 1.01 has real consequence. The Employer has committed to recognize the Union for its employees throughout Ontario, even when employed in newly acquired facilities.
>
> This interpretation also makes labour relations sense. The terms of the agreement are maintained for the employees and operation for which they were bargaining. Recognition is provided for other facilities that may be established or acquired. But this interpretation reflects that there is a significant labour relations distinction between recognition of the Union as bargaining agent at a newly acquired facility and the importation of already negotiated terms and conditions of employment into such newly acquired facility. First, the terms of the present agreement reflect the economic and operational reality of the existing Lilo facility. But they may not be practical or appropriate in a newly acquired facility, particularly one with pre-existing terms and conditions of employment. Second, the importation of these terms into a newly acquired facility would deny both the Employer and the employees the opportunity to participate in the negotiation of terms that make sense for them in their facility. Under this interpretation, the parties are free to negotiate provisions that may be better suited to the newly acquired facility. And they must negotiate those provisions.
>
> In conclusion, it is my declaration that Article 1.01, read together with the movement protection letter obliges the Employer to recognize the Union for employees employed by the employer throughout Ontario subject to the express exclusions in that Article. *That recognition applies the terms of the agreement to the Lilo facility anywhere in Ontario, but does not apply those terms to newly acquired facilities. That recognition does however oblige the parties to negotiate the terms to be applied in new facilities.*
>
> (emphasis added)

13. The parties differ as to what Arbitrator Jesin's award means. The employer asserts that the award requires that virtually a whole new collective agreement is required to be negotiated for any new facility; only the recognition clause would be set. The union argues that under the award, the Bunzl collective agreement would stand and apply to a new facility, but the parties could negotiate separate provisions relevant to the new facility.

14. In our view the emphasized portion of the excerpt from the award is strongly supportive of the employer's interpretation that with respect to a new facility the parties will have to negotiate new terms and conditions of employment other than the recognition clause. I note that this interpretation essentially puts the union in almost exactly the same position as any newly certified union: it has recognition but nothing else. Even if the union is correct, it is apparent that new terms and conditions applicable to the Morgan Scott plant would have to be negotiated. Under either interpretation it is

unclear what happens if the parties are unable to agree or whether the statutory obligation to bargain in good faith applies or can be implied.

15. Following the arbitration it would appear the parties continued to bargain. It is unclear, but it appears that either the basis of a collective agreement was negotiated at the bargaining table or the employer requested a final offer vote on its last offer. Either way, the employees refused to ratify a collective agreement. The union then held a strike vote among employees. The employees voted against a strike.

16. On August 31, 2009 Mr. Pilgrim applied to terminate bargaining rights. In its response to the termination application the union raised a number of objections to the application mostly relating to the fact that it had a s. 1(4) application with respect to the employees. It also asserted that the employer had initiated the termination application and asked that it be dismissed pursuant to s. 63(16) of the Act. The Board sealed the ballot box following the vote.

17. The s. 1(4) application came on for hearing on September 16, 2009. The Board adjourned to permit notice of the hearing to be given to the applicant in the termination application. By decision dated September 16, 2009 the Board set the hearing of both Board files for September 17, 2009.

18. The hearing continued without objection on September 17, 2009. The Board heard argument with respect to two issues and also, after hearing argument, ordered the counting of the ballots cast in the termination application. The employees voted against continued representation by the union. Further, the employer agrees that the pre-conditions to a s. 1(4) direction have been met and therefore the only issue is whether the Board would exercise its discretion to make a single employer declaration under s. 1(4).

19. The union argues that a s. 1(4) declaration should be granted in these circumstances. It relies on the fact that a s. 1(4) application is a separate and distinct application than its application for certification and that the merits of the application should be assessed without regard to the application for certification.

20. The union relies on a large number of Board decisions in support of this proposition. Perhaps the decision which best supports its argument and the policy and other reasons for it is *KNK Limited*, [1991] OLRB Rep. Feb. 209. There the Board stated:

> 39. Like the employer in *Great Atlantic and Pacific*, counsel for KNK argues that section 1(4) should not be used as a "substitute for certification" or to "circumvent" the process of certification. We were referred, *inter alia*, to the Board's comments in *John Hayman & Sons Company Limited* at paragraph 21, and in *Harold R. Stark Limited, supra*, at paragraph 11. However, like the Board in *Great Atlantic and Pacific*, we do not think we can attach much significance to the fact that union opts to utilize section 1(4) rather than apply for certification. The practical reason for doing so has been outlined above: non-union workers intentionally hired contrary to the terms of the prevailing agreement, are unlikely to have much appetite for union representation. If unsuccessful organizing efforts constituted a bar, few 1(4) applications would ever be granted. There is also the implicit suggestion in these cases that certification is somehow to be preferred to a related employer declaration (which seems to be considered vaguely illegitimate), or

> that a statutory process that expressly contemplates the testing of employee wishes should influence the interpretation of a section which does not. Neither proposition stands up to close scrutiny.
>
> 40. From a purely historical perspective, we should note that section 1(4) was added to a pre-existing legal scheme which already included certification, and the Legislature did not make a 1(4) declaration conditional upon the exercise or attempted exercise of rights under what is now sections 5-12 of the Act. Nor did the Legislature spell out the possibility of a representation vote as it did in other parts of the Act dealing with bargaining rights or continued union representation. In 1975 the Legislature added the words "upon the application of any person…" thereby making it clear that section 1(4) stood on its own as an independent basis for relief. It did not have to "piggyback" on some other type of representation application as had previously been the case.
>
> 41. There is nothing in this legislative development that suggests that the wishes of new employees with respect to union representation should be given any special significance, or that the certification process should be the preferred method of affirming bargaining rights if the requirements of section 1(4) are otherwise met. The closest statutory relative is section 63 which preserves bargaining rights in the sale of a business even though there too, there is a change in the legal identity of the employer. Like section 1(4), section 63 prevents a unilateral commercial transaction undertaken by the employer from undermining established bargaining rights. But section 63 is not discretionary, and bargaining rights can continue whether or not the employee complement is maintained, and regardless of employee wishes. No one has suggested that section 63 should not be used as a "substitute for certification" and it is not intuitively obvious to us how that phrase assists in the application of section 1(4).
>
> …
>
> 45. It is only in this sense that section 1(4) is a "substitute for certification": it makes certification unnecessary because it recognizes that bargaining rights already exist. It is equally accurate to say that section 1(4) prevents the extinction of bargaining rights from unilateral employer action and/or commercial law considerations unrelated to labour relations. It prevents a termination of bargaining rights by means other than those provided by statute.
>
> 46. For these reasons (and despite the cases to which we were referred) we do not think it is very helpful to describe section 1(4) as a "substitute for certification" or to make the exercise of our discretion conditional upon the wishes of the employees that KNK currently has in its employ. The problem remains: do the circumstances, viewed as a whole, warrant the relief contemplated by section 1(4).

21. We agree entirely with the Board's decision and reasoning in *KNK*. Section 1(4) is a separate proceeding and the union's bargaining rights exist pursuant to the Bunzl collective agreement irrespective of an application for certification or employee wishes in a termination application at Morgan Scott.

22. However, s. 1(4) is a discretionary provision and there are unusual facts in this case which were not present in the *KNK* case. In fact in few, if any, of the cases where a s. 1(4) application has been granted has the union been certified for the employer for which the declaration is sought. None of the cases have facts which are similar to those before us including the fact that the union commenced bargaining a collective agreement.

23. Had the union simply applied for certification for Morgan Scott and asked that the ballots not be counted there would not have been an issue. The union would have been prudently hedging its bets. Even had the union asked the Board to count the ballots, based on the case law, it may have an argument that the results of the vote ought not to be taken into account in assessing the s.1(4) application.

24. However, here the union went much further. It not only obtained bargaining rights for the very bargaining unit at Morgan Scott it seeks in the related employer application it began negotiating a collective agreement.

25. The union acknowledges that had it obtained a collective agreement with Morgan Scott, its collective agreement would eliminate the labour relations purpose behind its s. 1(4) application. However, it asserts, having failed to reach a collective agreement it is, in accordance with the Jesin award, entitled to apply the Bunzl collective agreement to Morgan Scott through the s. 1(4) application.

26. We disagree. In our view, the union's position, if accepted, would turn the process into a farce. The union cannot put the employees and the employer to the effort of making a collective agreement and then, when it fails, say, in effect, "none of that matters, we still get the Bunzl collective agreement". In our view, at some point, the union effectively made an election to bargain a collective agreement rather than pursue its s. 1(4) application. We do not need to determine at what point it made an election, only that it has done so. Accordingly, we see no reason to make a s. 1(4) declaration *vis a vis* Morgan Scott at Mississauga.

27. Our decision is reinforced by the Jesin award. While there is a dispute about what precisely the arbitration award means, it is clear on either interpretation that some negotiation will have to occur with respect to the Morgan Scott facility in Mississauga. It is absurd to require the parties to engage in that process when it has already been tried and failed.

28. That leaves whether a s. 1(4) application should be granted with respect to the Kingston facility. While the parties made some argument about this facility, we have considerable discomfort in making any ruling at this point. We simply do not know enough facts or allegations. It is therefore appropriate that this matter proceed to hearing with respect to Morgan Scott, Kingston if the union so desires.

29. This decision would appear to eliminate some of the union's objections to the termination application. However, the union's objection under s. 63(13) of the Act, at least, remains. Accordingly, the termination application will be set down for hearing. Given our decision with respect to the related employer application, it is not necessary that it continue to be heard with the termination application. The termination application is hereby severed from the related employer application and we are not seized of that application.

DECISION OF BOARD MEMBER SHANNON MCMANUS: November 18, 2009

1. I dissent.

2. The Board should not deny the applicant's section 1(4) application on the grounds that the union certified one of the two plants it is seeking and proceeded to attempt to negotiate a collective agreement.

3. Certification and termination are not bars to the determination of a 1(4) application; therefore, engaging in collective bargaining that stems from a certification does not present a bar when a collective agreement is not achieved.

4. The applicant filed its section 1(4) application in the same month it filed for grievance arbitration, April 2007. It made sense to do both, because had the union waited for outcomes of either procedure, it could have been accused of delay. The section 1(4) application takes precedence over what followed. It was never withdrawn. The employer was aware at all times that it was still "active."

5. Counsel for Bunzl presented its best case resting on lack of erosion, the lack of intermingling and that "there's no such thing as a without-prejudice certification." The arguments centred on the certification, not on the fact that bargaining had occurred. Counsel did not outline problems stemming from collective bargaining or say that the employer believed at any time that the union had withdrawn its section 1(4) application.

6. The Board was given no information about how bargaining ensued: how many meetings took place, the nature of the meetings, over what period of time. There were no arguments presented that engaging in bargaining while facing a possible related-employer declaration was egregious for the employer. All we know is that the parties did meet and the employer requested a final offer vote, which was turned down by the members. Final offer votes are turned down more often than not, yet collective agreements are eventually achieved.

7. Under case law, a certification is no bar to a 1(4) application. The Board ruled in *B&M Millwork Ltd,*. [1991] OLRB Rep. April 438:

> 29. .... section 1(4) was added to a pre-existing statutory scheme which already included a certification process. It was intended to stand on its own as an independent basis for relief and circumstances for existing bargaining rights impaired or otherwise threatened by corporate adjustments.

8. An application under section 1(4) takes precedence over an ensuing termination. In *Nazarene Fine Installations Inc.* [2004] OLRB Rep. July/August 762 (August 23, 2004), the employer sought to have the Board declare complaints filed by the union under sections 69 and 1(4) moot on the grounds that the Board had approved a termination. The Board declared the union's section 69 and 1(4) complaints "live" because they had been filed before the termination. The decision says:

> 11. It is clear to me that a live issue remains between the parties. In my view, a "tangible and concrete dispute" over whether Guide became bound by the collective agreement by which Nazarene was bound continues to

> exist. … If the mischief section 1(4) of the Act is designed to remedy occurred as a result of the creation of Guide and the conditions precedent for a single employer's declaration are established, the Board would likely exercise its discretion to declare Guide and Nazarene one employer.

9. In the present case, a "tangible and concrete dispute" is ongoing.

10. Erosion, or the potential of erosion, is the primary determinant of a 1(4) decision. Bunzl acknowledged that the three pre-conditions for a related employer declaration exist in this case. I agree with the union's arguments that if Bunzl and Morgan Scott are related employers under the Act, the potential for erosion will exist if the section 1(4) is not granted, and the union's statutory rights will be denied.

11. It made sense for the Board to adjourn the section 1(4) hearing pending the outcome of the grievance arbitration. The arbitration had the potential of resolving the section 1(4) issue and under those conditions the Board almost always adjourns. However, the arbitration did not resolve the issue. I do not agree with paragraph 14 of the majority decision. The arbitration award is not at all clear that the union would be expected to negotiate an entirely new collective agreement for each facility, when the two facilities have been found to fall under the scope clause of the Bunzl collective agreement.

12. Given these circumstances, the Board should either proceed directly to a hearing to determine the merits of the section 1(4) application or it should remain seized while asking the grievance arbitrator to clarify his decision, which may resolve the issue.

1852-09-FC Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Consolidated Drilling and Blasting Inc.**, Responding Party

Construction Industry – First Contract Arbitration – The parties had reached a deadlock regarding their positions on pension and benefits contributions – The union proposed that the employer contribute to centralized union pension and welfare plans, a common and fundamental feature of virtually all collective agreements in the construction industry – The employer, which only secures construction work from time to time, maintained a secure workforce by employing its construction workers in a non-construction capacity when construction work was not available – It did not wish to alter its benefits package since its package covered employees in the bargaining unit whether or not they were employed in the construction industry – The Board found that the position taken by the employer on the applicant's pension and benefit contribution proposal clearly reflected a difficulty on the part of the employer to accept the role of the applicant as the exclusive bargaining agent of its construction employees – Concerning the benefits package the employer's position that the employees would be better off with their current package than the one proposed by the union suggests that the employer was advocating on behalf of the members of the bargaining unit —a role which belongs exclusively to the union – A similar concern arose with respect to pension contributions, since the employer was prepared to pay the cost of the pension benefit, as long as there was no suggestion to any of its other employees that the applicant secured that benefit for

the construction labourers employed by the employer – Direction to settle a first collective agreement by arbitration

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Sean McFarling* and *Mike Ryan* for the applicant; *Kathleen Stokes* and *Gilles Lebeau* for the responding party.

DECISION OF THE BOARD; December 4, 2009

1. This is an application brought pursuant to section 43 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act"). The applicant seeks a direction that a first collective agreement be settled by arbitration. This proceeding came on for hearing before me on November 9, 2009.

Facts

2. The parties agreed on a core group of relevant facts for the purposes of this application. In addition, the responding party called evidence through Mr. Gilles Lebeau, the Vice-President of Finance and Operations of the Mansour Group, whose evidence is incorporated into the facts that are set out below.

3. The responding party is an employer that is engaged from time to time in performing work in the construction industry in the Province of Ontario. As a result of a series of construction industry certification applications made to the Board in 2007, 2008 and 2009, the Board issued three certificates to the applicant declaring it to be the exclusive bargaining agent for all construction labourers employed by the responding party in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in Board Areas 16, 18 and 32, with the usual managerial exceptions. The Board also issued a fourth certificate declaring the applicant to be the exclusive bargaining agent for all construction labourers employed by the responding party in the industrial, commercial and institutional sector in the Province of Ontario, again with the usual managerial exceptions.

4. By operation of the Act, the responding party is automatically bound to the applicant's Provincial ICI Agreement as well as to a number of accredited collective agreements applicable to Simcoe County in Board Area 18, including the Toronto and Area Road Builders Agreement. The parties agreed to negotiate one non-ICI sector collective agreement covering the bargaining rights held by the applicant in Board Areas 16, 32 and the District Municipality of Muskoka portion of Board Area 18. The parties exchanged proposals on October 17, 2008, January 28, 2009, February 4, 5 and 6, 2009, and on May 14, 2009. Two other meetings (one held on April 22, 2009 and the second held on July 29, 2009) involved the participation of a Ministry of Labour conciliator. The parties were not successful in reaching a collective agreement. The Ministry issued "no board" reports with respect to the three bargaining units - two in May, 2009 and one in August, 2009. The applicant is now in a legal strike position with respect to each of its non-ICI bargaining units.

5. The applicant considers its Sudbury Heavy Civil Construction Collective Agreement (the "Sudbury Heavy Civil Agreement") to be its "standard collective agreement" in Northern Ontario. Accordingly, it used the Sudbury Heavy Civil Agreement as the basis for the contract proposal it put

to the responding party. The parties used that document as the basis for collective bargaining, and in fact have agreed upon the vast majority of the provisions to be included in their collective agreement. They have been unable to agree upon only three particular provisions:

(a) the duration of pay periods;

(b) the manner in which holiday pay is to be paid; and

(c) contributions to the applicant's pension and benefits plans.

6. The parties agreed in their written submissions to the Board that comments made by the parties during the course of negotiations suggested that the first two issues could probably be resolved at the bargaining table. Mr. Lebeau and both counsel reiterated that point during the course of testimony and argument, respectively. That having been said, during the course of argument both counsel explained their clients' positions on those issues and argued that those positions ought (in the case of the applicant) or ought not (in the case of the responding party) to lead the Board to make the direction sought. The third issue identified above – contributions to the applicant's pension and benefits plans - is the critical sticking point. Put briefly, the responding party has rejected the applicant's proposal that it make monthly contributions to the applicant's pension and benefit plans.

7. I set out below the positions taken by both parties on each of the three live issues.

(a) The Duration of Pay Periods

8. With respect to the duration of pay periods, the applicant proposed that a clause be included within the collective agreement requiring that all wages be paid in cash or cheque at the option of the responding party during working hours, on a weekly basis. The responding party is not prepared to pay the employees in the bargaining unit on a weekly basis. It prefers to maintain its current practice of paying employees on a bi-weekly basis.

9. The applicant submits that it is a standard practice in the construction industry to pay wages to employees on a weekly basis. That practice is consistent with the brief periods of employment typically enjoyed by individuals who are engaged in construction work. The applicant notes that the other collective agreements that bind the responding party (the Provincial ICI Agreement and the accredited agreements applicable in Simcoe County) all require the responding party to pay wages to its employees on a weekly basis. The applicant's position ensures that consistent terms and conditions are maintained for employees regardless of the sector of the construction industry in which they work.

10. The responding party states that its position on the issue of pay periods is based upon a need for "administrative continuity" amongst a larger group of companies – the Mansour Group - within which the responding party belongs. The responding party states that it would be logistically difficult to separate out five or six employees from the larger group for special treatment. It asserts that the administrative disruption caused by treating these few employees differently would be far greater than their modest number warrants. Mr. Lebeau testified that the cost of dealing with these five or six individuals separately would double the responding party's administration costs, because the work could not be performed by the person currently employed to do this work for the Mansour Group. Mr. Lebeau was not cross-examined on that testimony. The responding party also asserts that because it performs almost no work in the ICI sector of the construction industry, its obligation to pay

on a weekly basis for work performed under that collective agreement ought not to be a factor in determining this application.

(b) The Payment of Holiday Pay

11. With respect to the payment of holiday pay, the applicant proposed that a clause be added to the collective agreement to provide that employees covered by the agreement be paid at a rate of four percent (4%) of gross wages for vacation pay and five percent (5%) of gross wages in lieu of recognized statutory holidays that are listed in the collective agreement. The responding party indicated that it is prepared to pay vacation pay at a rate of four percent (4%) of gross wages but will not remit five percent (5%) in lieu of statutory holidays. Instead, the responding party desires to pay bargaining unit employees for holidays in accordance with the provisions of the *Employment Standards Act, 2000*, R.S.O. 1990, c. E.14, as amended ("the ESA"). That is, the responding party desires to pay bargaining unit employees only for the holiday pay that it is required to pay, in accordance with the ESA.

12. The applicant asserts that a global payment for both vacation and statutory holidays is a common feature in the construction industry arising, in part, from the brief periods of employment frequently enjoyed by construction industry employees that would often preclude an employee from receiving statutory holiday pay. Again, it notes that the responding party must make similar payments to its employees working under the other collective agreements to which it is bound, and therefore asserts that its position ensures consistent terms and conditions of employment for the bargaining unit employees.

13. As noted above, the responding party does not take issue with the obligation to pay holiday pay to its bargaining unit employees. However, it desires to pay holiday pay in the same manner that it makes those payments to employees in the other companies included within the Mansour Group. It relies upon the administrative difficulties that would be created if it were to pay employees holiday pay in a manner inconsistent with the payment for holidays made to employees working in the Mansour Group of companies. It also asserts that there would be considerable dissention amongst its employees if it were to pay holiday pay in accordance with the proposal made by the applicant, because the employees who are paid in that fashion will fail to appreciate the fact that holiday pay is paid in each paycheque and will question the absence of pay for each holiday on their pay stubs.

(c) The Payment of Pension and Benefit Contributions

14. As noted above, the applicant's proposal for the payment of pension and benefits contributions is clearly the single greatest impediment to concluding a collective agreement with the responding party. The applicant has proposed language that duplicates that contained in the Sudbury Heavy Civil Agreement, which proposal would require the responding party to make contributions to the Labourers' Pension Fund of Central and Eastern Canada of a certain amount for each hour worked by its employees under the collective agreement. Similarly, the responding party would be required by the proposed language to make certain contributions to the Labourers' Local 493 Welfare Trust Fund based upon the hours worked by its employees under the collective agreement.

15. Like the other issues in dispute, the applicant notes that the responding party is bound to its Provincial ICI Agreement and various other accredited collective agreements that require pension

and welfare benefits to be paid to the relevant union funds on the basis of hours worked. The applicant notes (and the responding party does not dispute) that it is a common and fundamental feature of virtually all collective agreements in the construction industry that employers contribute to union pension and welfare plans. As a result, the applicant asserts that there is nothing untoward or unusual in respect of the position it has taken in bargaining with the responding party.

16. The applicant notes that the implementation of union-administered pension and benefits plans is grounded in the nature of employment in the construction industry. Typically, the union is the source of labour for area unionized employers through the mechanism of the hiring hall. In addition, employment in the construction industry is often relatively brief in duration. As a result, a construction employee normally has several different employers over the course of a construction season. In order to ensure that its members accrue enough hours to vest in a pension plan and to receive health and welfare benefits, construction unions administer a centralized plan to which all employers contribute on behalf of the union's members it employs based upon the number of hours worked by each member. The applicant is not aware of any construction union in Ontario that does not work on this model. The responding party did not suggest that there is one.

17. The responding party asserts that it has legitimate business reasons for the position it takes on the question of benefits. It states that its employment model is based upon the premise that it is beneficial to employ individuals on a long-term basis rather than on a short-term basis. That is, although it acknowledges that to some extent the question of maintaining individuals in its service on a long-term basis is beyond its control, to the extent that it can take steps to ensure that its employees stay in its employ, it prefers to take those steps.

18. The responding party states that it is not interested in altering its hiring model to reflect the hiring hall model utilized by the applicant. It states (and the applicant does not dispute) that although it secures work in the construction industry from time to time, it does not obtain a consistent supply of construction work such that it can keep its bargaining unit employees busy year round performing work in the construction industry. In order to maintain a stable work force, the responding party has historically employed its construction workers in a non-construction capacity when construction work is unavailable. Usually this has meant having those individuals work in the responding party's quarry operations, but this past year the responding party "rented" its construction employees out to other entities in the Mansour Group in order to keep them busy. Mr. Lebeau noted that by doing so the responding party ensured that its construction employees did not lose benefits, the possibility of which he characterized as being "offensive in many ways". The responding party already offers benefits to the bargaining unit employees and does not want to alter the benefits package, because its current benefits package will cover employees in the bargaining unit whether the work that they are performing is or is not in the construction industry. If the applicant's proposal is accepted, Mr. Lebeau stated that the responding party's employees would effectively lose their benefits until the required number of hours accrue. In addition, if the responding party were to agree to the benefits structure proposed by the applicant, it asserts that its employees will almost certainly leave its employ when it has no construction work, because in the absence of construction work any given employee will not be able to accrue hours towards his benefits. In that instance, the responding party also objects to the applicant's proposed benefits plan because if the employees do not secure the requisite hours to qualify for the applicant's benefits the money the responding party contributes to the benefit plan effectively becomes a "charitable donation" from the responding party to the applicant.

19. Finally, the responding party notes that the same benefit package offered to all employees in the companies that form the Mansour Group is offered to employees working for the responding party. The responding party asserts that making different benefits available to employees in different companies will make certain "unique" benefits unavailable to its employees in the bargaining unit and will cause friction amongst its employees. By way of example, Mr. Lebeau noted that the responding party's employees were each provided with a Costco card in order to secure the lowest cost possible for prescription drugs. If the responding party were to accept the offer made by the applicant, Mr. Lebeau noted that this benefit would be lost to the employees. Mr. Lebeau also noted his concern that carving out one company from the others would create a lack of accountability for benefits, because the responding party would merely be sending a cheque to a benefit fund, which is entirely different than what the responding party has traditionally done. In addition, it was asserted by Mr. Lebeau that the advantageous group rates that the Mansour Group has secured for benefits coverage would be negatively affected should it be possible for some of the individuals to exit from the group for the purpose of securing separate benefits coverage. Mr. Lebeau asserted that the benefits of 180 employees would be put "at risk" should the five or six employees of the responding party in question be allowed to exit the group.

20. With respect to the pension benefits, the responding party states that it does not offer a pension to any of its employees, save for a group of employees who are members of the CAW Canada in a bargaining unit at Mansour Mining, the entity that Mr. Lebeau testified was the "core company" of the Mansour Group. That bargaining relationship has lasted approximately 20 years. The CAW Canada pension benefit is valued at approximately one-third the value of the applicant's pension benefit. Mr. Lebeau testified that "grief" would result "on both sides" should the employees in only one company in the Mansour Group be offered a significant pension benefit.

21. Mr. Lebeau testified that the difference between the parties with respect to pension contributions is not a "dollars and cents" issue. The responding party is prepared to give the applicant the money equivalent of the pension contributions it seeks, but is concerned with the possibility that it might be seen as agreeing to a pension in the nature of that proposed by the applicant. During cross-examination Mr. Lebeau acknowledged that he does not want other employees in the Mansour Group to perceive that the responding party's construction employees are receiving a pension, and that he has to be careful signing a contract that has substantially different terms of employment. He stated that how the collective agreement would affect the other employees in the Mansour Group is important to him.

22. The responding party states that during the course of bargaining it attempted to address its and the applicant's different concerns over the pension contributions in an inventive and reasonable way. It offered to remit directly to the applicant funds equivalent to the amount of hours worked by the employees, multiplied by the amount of the pension sought. The applicant would then be free to do whatever it wanted with the funds, including putting that money into the affected employees' pension accounts. This would permit the responding party to say that it does not offer a pension to any company that is part of the Mansour Group (presumably other than to the company bound to the collective agreement with the CAW Canada).

23. The responding party states that the applicant was not satisfied with this solution because it would have to track the hours worked by bargaining unit employees. The responding party questions the legitimacy of this response, and asserts that the applicant would gain knowledge of the hours worked by its members in the bargaining unit in any event. The responding party states that it

suggested another approach, wherein the parties would agree in advance to identify a percentage of time that any given employee would be deemed by the parties to be working in the construction industry and simply remit that amount to the applicant on behalf of each employee. The responding party asserts that the applicant rejected this approach and would not offer an alternative.

24. During testimony Mr. Lebeau characterized himself as someone who is "passionate" about employee benefits, and noted that the Mansour Group had made considerable strides in employee benefits during the four years he had worked for the Group. He agreed when cross-examined that he is concerned for the interests of the responding party's construction employees. In fact, he went so far during cross-examination as to indicate that he had trouble understanding why applicant's counsel did not have that same concern in mind. Mr. Lebeau testified that the reaction of the employees of the Mansour Group to any agreement reached with the applicant relating to the responding party's construction employees, and the need to maintain "harmony within the [Mansour] Group", was one element of the responding party's concern. He also told the Board that he desires employees to feel that they have the same opportunities within the Mansour Group. Although he noted that not all benefits are the same within the constituent companies of the Mansour Group, he strives to achieve that uniformity, though he finds it "tough" to actually secure it.

25. There are other facts of significance that were adduced by the parties. In 2005 one of the companies in the Mansour Group, CM & D Drilling and Tunneling ("CM & D Drilling"), entered into what was described as a "Project Agreement" with the applicant relating to a job known as the South End Sewer and Tunnel Project. For the purpose of that project, CM & D Drilling agreed to be bound by the terms of the Sudbury Heavy Civil Agreement, save and except the mining sector, as defined in the Project Agreement. The applicant offers this as evidence that the "administrative disruption" argument made by the responding party has little credibility, as one of the Mansour Group companies was quite prepared to bear any such increased administrative cost in order to perform certain work when it was convenient to do so. During the course of his testimony, Mr. Lebeau stated that it was anticipated that the South End Sewer and Tunnel Project would result in two years worth of continuous construction work. According to Mr. Lebeau, the administrative inconvenience is not as significant when the work in question is continuous.

26. Finally, there is one significant clause contained in the Sudbury Heavy Civil Agreement that has some bearing on the issues in this proceeding. Although it was not disclosed during the course of the hearing how many employers in Board Areas 16, 18 and 32 are bound to collective agreements with the applicant that are modelled upon the Sudbury Heavy Civil Agreement, there was no dispute that the collective agreement that binds each of those employers contains a clause that reads as follows:

> Co-Operation
>
> ...
>
> Should the Union enter into any agreement more favourable to any other company performing work similar to that covered by this Agreement, the Union agrees to extend the more favourable conditions to the Company, such extensions shall be considered an amendment to this Agreement.

The applicant acknowledged during the course of argument that this provision limited its ability to propose substantive responses to the positions proposed by the responding party during the course of negotiations. Counsel for the applicant indicated during argument that the applicant was of the view that the revisions proposed by the responding party that it had agreed to during bargaining which moved away from the text of the Sudbury Heavy Civil Agreement did not trigger this provision.

Legal Principles

27. Subsection 43(1) of the Act provides that where the parties are unable to effect a first collective agreement and the Minister has released a "no board" report, either party to a bargaining relationship may apply to the Board to direct the settlement of a first collective agreement by arbitration. There is no dispute in this proceeding that the statutory prerequisites required to make a timely application to the Board for first contract arbitration have been established.

28. The basis upon which the Board is mandated to consider and make its decision as to whether a first collective agreement ought to be settled by way of arbitration is reflected by subsection 43(2) of the Act. That subsection provides as follows:

> (2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
>
> (a) the refusal of the employer to recognize the bargaining authority of the trade union;
>
> (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
>
> (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
>
> (d) any other reason the Board considers relevant.

In effect, the Board must consider, first, the question of whether it appears to the Board that the process of collective bargaining has been unsuccessful. If there is such an appearance, then the Board must then consider whether the responding party has engaged in conduct that falls within subsections 43(2)(a) to (d). If the responding party has engaged in such conduct, then the Board must satisfy itself that there is a causal connection between the responding party's conduct and the failure of the collective bargaining process. Only once these prerequisites have been established is the Board to direct that a first collective agreement be settled by way of arbitration.

29. The Board has considered the application of section 43 of the Act (or its predecessors) on numerous occasions since the provision was added to the Act in 1986. Principles applicable to the interpretation of section 43 have been developed and refined by the Board during that 23 year period. I set out a number of those principles below.

30. First contract arbitration is not intended to displace the collective bargaining process. Instead, its inclusion in the Act recognizes that the negotiation of a first collective agreement may sometimes be thwarted by unjustified intransigence, and that where certain conditions are met a party

ought to have access to the remedy of an imposed first collective agreement (see *Nepean Roof Truss Ltd.*, [1986] OLRB Rep. July 1005, at paragraph 16). The remedy of an arbitrated first collective agreement is only available to a party when it appears to the Board from a review of all of the circumstances that the process of collective bargaining has been unsuccessful for one or more of the reasons enumerated in subsection 43(2)(a) to (d). As noted by a former Chair of the Board in *Nepean Roof Truss*, cited above, at paragraph 17:

> "The use of the word 'process' imports into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those postures most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons. This does not intend to suggest that the applicant's conduct will be a bar to the imposed settlement of a first contract, but rather that its conduct is relevant in assessing the reason for the failure of the process".

31. Turning to the four potential grounds for making a direction pursuant to subsection 43(2) of the Act, the applicant asserts that the responding party has adopted uncompromising bargaining positions without reasonable justification. The concept of a "reasonable justification" for an uncompromising position that is reflected by subsection 43(2)(b) of the Act requires that an objective assessment be made by the Board of the responding party's justification for its position. It is not enough for the responding party to have a reason for taking its position. What is "reasonable" in any given proceeding will be determined by reference to the full context of the situation before the Board, including such considerations as "the current climate of collective bargaining, the particular bargaining process undergone by the parties, the institutional realities from which it derives and its intrinsic merit" (*Nepean Roof Truss*, cited above, at paragraph 19), "the general landscape of labour relations and the specific labour relationship between the parties" and a weighing and balancing of the competing interests of the parties (see *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, at paragraph 26; *MacMillan Bloedel Building Materials Ltd.*, [1990] OLRB Rep. January 58, at paragraph 20; and *Kraus Carpet Mills Ltd.*, [1991] OLRB Rep. January 50, at paragraph 13).

32. The applicant also relies upon subsection 43(2)(a) of the Act, in that it asserts that the positions taken by the responding party implicitly reflect a refusal on its part to recognize the bargaining authority of the applicant. The applicant states that one or more of the responding party's uncompromising positions springs from an underlying refusal on the part of the responding party to recognize the applicant's bargaining authority on behalf of its construction labourers. If this were the case, a direction requiring a first contract to be determined by way of arbitration would be appropriate.

Argument

33. I set out below in summary fashion the argument of the parties.

34. The responding party argues that to date bargaining has progressed reasonably well. It has accepted the vast majority of the proposals suggested by the applicant, and has at all times reflected flexibility in its approach to outstanding issues. It states that it has continuously attempted to move forward during the course of negotiations and has offered solutions to the applicant. At this stage, there are only three issues remaining in dispute. Given the acknowledgement by the parties that the first two issues can be worked out at the bargaining table, the only real issue left to be resolved relates to the pension and benefits contributions proposal made by the applicant.

35. With respect to that proposal, the responding party asserts that it is the applicant that has remained fixed on its initial language and has shown no willingness to move. The responding party notes that the applicant has refused to consider its alternative suggestions and has not come back to the table with any compromises for consideration by the responding party. Instead, it merely advises the responding party that its initial proposal remains on the table for acceptance. The responding party characterizes this as a situation in which the applicant is unable to consider the reasonable solutions it has proposed and meet the responding party "half-way", because of its need to maintain the structure of the Sudbury Heavy Civil Collective Agreement for the purposes of its collective agreements with third parties.

36. The responding party notes that it engages in both construction work and non-construction work in the normal course, and that it does not have sufficient construction work available to keep its construction employees busy all of the time. As a result, it has a different structure than the typical construction employer and has different needs that must be appreciated by the applicant when a collective agreement is negotiated. The responding party states that it is not unreasonable for it to expect to be treated as an individual entity when negotiating a collective agreement, and that it should not be required to agree to a pension and benefits provision that is identical to terms reached between the applicant and other pure construction employers for the sole reason that the applicant and those employers agreed to those terms. The responding party desires to negotiate a collective agreement that works for it, without reference to the agreements that work for other employers that perform construction work in the area.

37. Counsel for the responding party relied during the course of argument upon two prior decisions of the Board. In *Atway Transport Inc.*, [1991] OLRB Rep. April 425, the union came to the bargaining table determined to obtain what it considered to be its "standard collective agreement". A number of the provisions contained in that collective agreement were not applicable to the employer's workplace, including its proposed recognition clause. Notwithstanding that fact, the union maintained its positions during bargaining. Upon not being able to reach a collective agreement with the employer, the union brought an application before the Board pursuant to what is now section 43 of the Act.

38. The Board concluded that it would not make a direction requiring that a collective agreement be determined by way of arbitration because it was not satisfied that the process of collective bargaining between the parties had been unsuccessful for the reasons set out in what is now subsection 43(2). It was satisfied that the employer's positions were not unreasonable or so rigid as to be the cause of the breakdown in negotiations. Instead, the Board concluded (at paragraph 34) that it was the union's intransigence, including its insistence upon a recognition clause that it could not lawfully bargain to impasse, and "its refusal to budge from its 'standard collective agreement' or to pay any real attention to the [employer's] proposals and explanations" that led to the breakdown between the parties. At paragraph 35 the Board made the following observation:

> "The applicant neither asked nor cared about the manner in which the respondent structured its operations. Even though the applicant must have known something of the respondent's structure from prior litigation between the parties ... its proposals reflect no acknowledgement or concern in that respect."

The Board noted in its decision that the evidence demonstrated that it was the union that was deaf to the employer's explanations and was so intransigent in its position that bargaining did not proceed as it might have. The Board also noted (at paragraph 40) that the union's unwillingness to consider a provision offered by the employer on the ground that its other collective agreements did not have such a provision was "no reason for the [union] to dismiss the [employer's] proposal out of hand".

39. The responding party also relies upon the Board's decision in *Saxum Canada Inc.*, [1999] OLRB Rep. March/April 328. In that proceeding, an application was made to the Board for a direction that a first contract be determined by way of arbitration when there were four outstanding issues in dispute between the union and the employer. The employer asserted – as does the responding party in the instant proceeding - that the process of collective bargaining had not been unsuccessful. The Board noted that this is a "threshold question" and then considered the following observations from the Board in *Metro Taxi Ltd.*, [1996] OLRD No. 3226, at paragraphs 69 to 78:

> 69. How does one measure whether the process of collective bargaining was unsuccessful? In answering this question, we begin by assuming that the intent of the legislation is to give primacy to free collective bargaining in the recognition that an agreed to collective agreement is always preferable to an imposed one. ... For this reason, the threshold for lack of success must not be so low that it encourages parties to work towards a first contract direction rather than an "agreed to" settlement.
>
> 70. In *Yarrow Lodge and H.E.U.* (1993) 21 CLRBL (2 d) 1, the British Columbia Labour Relations Board undertook a comparative review of first contract jurisprudence across all Canadian jurisdictions. This was done for the purpose of setting policy guidelines following amendments to the *Labour Relations Code* S.B.C. 1992, c. 82. Although the wording of the Ontario and British Columbia statutes differ, the Board there still had to address the issue of how high must the threshold be set.
>
> 71. The Board in *Yarrow* began with the proposition that a premium must be placed on encouraging parties to voluntarily conclude the process of bargaining for a first collective agreement. It observed on page 25:
>
> Direct negotiations between parties who must ultimately govern themselves in accordance with the contract negotiated is more likely to end in an agreement which accurately reflects their own needs and moreover, is viable in terms of its day-to-day administration: this is preferable to any contract imposed upon them by some third party. It is this self-government which is fundamental to free collective bargaining.
>
> 72. The Board in *Yarrow* went on to observe that in some circumstances, the obligation to voluntarily conclude a first collective agreement may, if strictly applied, frustrate the rights of a party to have real access to collective bargaining.

> 73. The Board also noted that if the threshold for access to first contract arbitration were to be set too low, it would adversely affect the actual dynamics of bargaining. It described at paragraph 27 the "corrosive or chilling" effect that compulsory arbitration might have on bargaining. This would occur where parties were unwilling to compromise because at the end of the day, they assume that a third party will "split" the difference between the two. For this reason, compromise in itself would be seen as prejudicial.
>
> 74. Further, the Board observed that if access were too easy to obtain, parties would increasingly take positions at the table designed primarily to enhance their positions before a Board of Arbitration. This was described as a "narcotic" effect because it would mitigate against any attempts to establish "momentum" to obtain a voluntary agreement.
>
> 75. Finally, the Board stated that a low threshold might remove the realistic possibility of a strike or lock-out, those potential "weapons" having been recognized as important catalysts in forcing parties to come to agreement.
>
> 76. In our view, the observations in *Yarrow* are of assistance in re-examining the Act, following the passage of Bill 7. The practical consequences of the amendments in Bill 7 were to remove "automatic" access to a first contract direction and to restore the necessity of examining the conduct of the parties during negotiations. The legislature must have intended by this change to strengthen the obligation to "stick with" the negotiated process, until such time as the process itself was jeopardizing the right to have access at all to collective bargaining. Given the primacy of this obligation, if the threshold for access were to be set too low, the "narcotic" and "corrosive" or "chilling" effects of easier access to arbitration might adversely affect the structure of the collective bargaining process early on.
>
> 77. As the jurisprudence suggests, there are no "mandatory" steps or numbers of negotiating sessions that parties must have before the Board may determine that collective bargaining has been unsuccessful. What must an applicant then show to discharge the onus of demonstrating that collective bargaining has been unsuccessful?
>
> 78. We would expect that at a minimum, an applicant should be able to show that it has attempted to seriously explore with the respondent all of the significant issues that exist between the parties. Of course, if the respondent has in fact rendered such attempts pointless, then that would be sufficient to determine that bargaining has been unsuccessful. Are further discussions possible and if so would they be helpful or fruitful? These are the types of questions that have been posed in the Board's jurisprudence. There is no specific number of bargaining sessions that parties must participate in before these questions can be answered. In some cases, many unproductive sessions may be indicative of a lack of success, but it is not necessarily so.

40. Applying this approach to the case before it, the Board in *Saxum Canada*, cited above, noted that the parties had been able to agree on a vast number of provisions that would form part of a proposed collective agreement. When bargaining had broken off, there were very few issues remaining on the table. The Board noted (at paragraph 60) that, with respect to one of the outstanding issues, namely an unusual method for determining the wage increase for the second year of a two year agreement, the union had "never suggested changes to this proposal or suggested an alternative

approach outside of its original proposal for a defined salary grid" and that there was "no evidence of any meaningful dialogue concerning a second year". Various potential options identified by the Board had not been discussed by the parties.

41. In these circumstances, the Board was of the view that it had not been established by the union that the process of bargaining had been unsuccessful. The Board was of the view that the parties should return to the bargaining table to attempt to reach a collective agreement, and dismissed the application.

42. Counsel for the responding party asserts that a proper consideration of the factors identified in the two latter cases, and those noted by the Board in *Nepean Roof Truss*, cited above, ought to lead the Board to the conclusion that this application is premature because it has not been established that the process of bargaining has been unsuccessful. Counsel argues that something more than a failure to achieve an agreement has to be evident on the evidence before the Board, and that such evidence is not present here. She notes that most of the applicant's requests were agreed to by the responding party, and that the issues in dispute were the subject of alternative proposals and options by the responding party. She states that the applicant, in all cases, merely referred the responding party back to its initial proposal without any explanation, compromise or alternative position. It is asserted that the applicant has not tried to understand the reality faced by the responding party, particularly the limited amount of construction work performed by its employees in any given year. Counsel suggests that further negotiation sessions would be fruitful, if the applicant were prepared to engage in meaningful dialogue regarding the key issue.

43. Not surprisingly, the applicant views the situation entirely differently. It has attempted to negotiate a collective agreement on behalf of a number of construction workers employed by the responding party, and desires to enter into a collective agreement that reflects the unique nature of construction industry employment in Ontario. It submits that the responding party's approach to bargaining reflects a resistance to the position that it is a construction employer, and that it is unreasonable for the responding party to not accept the terms proposed by the applicant at bargaining. Counsel for the applicant notes that the issues that remain in dispute are absolutely fundamental to construction industry unions and that in that light it is hardly surprising that the applicant was intractable with respect to its positions on these items. He states that the position taken by the responding party reflects an underlying refusal by the responding party to recognize the applicant's bargaining authority, and that the applicant's intransigence is explained by reference to the responding party's position on the outstanding issues.

44. Counsel for the applicant noted during argument that a key consideration in the construction industry is the desire to maintain homogeneous working conditions, reflected in particular by the provisions of the Act speaking to terms and conditions of employment in the ICI sector of the construction industry. Homogeneous terms and conditions of employment ensure both stability and consistency in the construction industry, and thus proposals such as those insisted upon by the applicant are the norm. It is asserted that the applicant desires, quite reasonably, to keep all construction industry employers in the relevant geographic areas on the same, level playing field. The existence of the hiring hall, a global payment for vacation and holiday pay, weekly pay periods and set contributions for pension and benefits are the norm and all employers in a given geographical area that are bound to a bargaining relationship with a particular trade union are required to make remittances based on the number of hours worked by its construction employees. The responding party, it is asserted, refuses to acknowledge the realities of the construction industry within which it

works because it insists upon importing industrial union terms of employment and approaches to the negotiations.

45. In this context, counsel for the applicant argues that the proposals put forward by the applicant are utterly unremarkable. The applicant's proposals ensure that its members secure benefits and a pension no matter who employs them in the relevant geographic areas. In that regard, the applicant appreciates that the responding party prefers to maintain a long-term workforce. However, counsel notes that long-term employment is not a reality in the construction industry. Counsel argues that the responding party's position effectively suggests that the applicant ought to consent to a situation in which its members are encouraged to work non-union for the responding party when there is no construction work available. It is asserted that such a suggestion at the very least undermines the applicant's role as the bargaining agent of these employees. The applicant desires that the employees in question be allowed to work wherever they want to work, without losing benefits or pension contributions. The applicant submits that the responding party's proposals undermine the core of what the applicant does, and for all intents and purposes reflect its refusal to recognize the applicant as the lawful bargaining agent of its construction workers.

46. With respect to the assertion by the responding party that collective bargaining has not yet been unsuccessful, counsel for the applicant states that the evidence suggests that collective bargaining has, in fact, been unsuccessful, and that impasse has been reached. Counsel notes that the applicant and the responding party have already had long, philosophical discussions regarding the positions taken by the responding party, and that the same arguments raised during bargaining were made before the Board in this proceeding. Counsel distinguished the *Atway Transport* decision on the basis that the applicant has not forced the entire Sudbury Heavy Civil Agreement onto the responding party, and has not attempted to force the responding party to accept a broader recognition clause than it can enforce. Counsel asserts that it is unreasonable in the context of a construction industry certification to expect the applicant to include within the collective agreement provisions that recognize the responding party's role as an industrial employer.

47. With respect to the pension and benefits contributions proposal, counsel for the applicant asserts that the responding party's position is clearly intended to send a message to the other employees of the Mansour Group that joining the applicant does not provide an employee with any identifiable benefit. Counsel notes that ultimately it is the applicant that bargains on behalf of the construction labourers of the responding party, and that even if the responding party's intentions are benign, it is not the role of the responding party to make choices for the individuals represented by the applicant. As a result, counsel states that the responding party's concerns regarding the applicant's proposal regarding pensions and benefits (i.e. whether its employees will benefit as much under the applicant's plans as they would under those maintained by the responding party) do not lie in its mouth to make.

48. The applicant asserts that it has been frustrated by the responding party's refusal to agree to terms and conditions of employment that are common and necessary in the construction industry – provisions that the responding party is already bound to in certain other sectors of the construction industry. Counsel noted during argument that one Mansour Group company, CM & D Drilling and Tunneling, was quite content to agree to identical provisions when it was perceived by it to be in its best interests to do so. The applicant urges the Board to conclude that there is no reasonable justification for the positions taken by the responding party because those positions (a) require the applicant to treat the responding party as if it were another, non-unionized entity in the Mansour

Group; (b) do not recognize the hiring hall model that is at the core of the applicant's representational rights; (c) encourage employees to remain working for the responding party performing non-union work when there is no bargaining unit work, and (d) are put forward having regard only to how they will be perceived by the non-unionized employees working for the responding party's sister entities. Put simply, the applicant states that the responding party is unwilling to appreciate that it is, in fact, an employer in the construction industry. No matter how creative the responding party asserts that its been, the applicant asserts that the only conclusion that can be reached is that the responding party has refused to acknowledge the authority of the applicant as agent for its construction labourers, and therefore that a direction requiring the settlement of a first collective agreement must issue.

Decision

49. As noted above, the remedy sought by the applicant is only available when "it appears to the Board that the process of collective bargaining has been unsuccessful". In many of the first contract arbitration proceedings previously brought before the Board the parties have agreed that the process of bargaining has been unsuccessful, and focus their arguments on the four enumerated grounds upon which a first contract direction can be ordered, and the question of whether the causation required by the Act is present on the facts of the proceeding. In this proceeding, the responding party asserted that the evidence did not establish an appearance that the process of collective bargaining had been unsuccessful at all, and urged that the application be dismissed on that basis alone. Accordingly, I will deal with this issue first.

50. There is a legitimate question raised in this proceeding as to whether the process of collective bargaining has been unsuccessful to date. There is no doubt that the parties have reached the stage where bargaining cannot continue in the absence of a change to the bargaining positions adopted by the parties with respect to the three issues in dispute. During the course of argument counsel for the applicant conceded that if only the first two issues remained in dispute (that is, the issues of weekly/biweekly pay and the method of payment of holiday pay), his client would not be surprised if the Board were to dismiss the application and require the parties to return to bargaining. As noted earlier, counsel for both parties and Mr. Lebeau agreed during the course of the hearing that the parties could resolve these two issues if they were the only outstanding issues with which they had to deal. Accordingly, at this somewhat basic level it can be said that bargaining has not yet reached the stage that it appears to have been unsuccessful. The parties agree that if they were to return to the bargaining table, something more could be accomplished.

51. But to dismiss the application on that narrow basis would not address the true underlying issue, namely the applicant's proposal regarding contributions to its pension and benefits plans. During his opening argument counsel for the applicant neatly summarized the issue by asserting that his client believed it to be unreasonable for the responding party to "refuse to accept" the proposal it had put forward. The applicant is not prepared to move at all on its initial proposal. The responding party is not prepared to accept that proposal. The responding party has suggested alternatives to the applicant's initial position, but the applicant is not prepared to consider those alternatives or to propose others. An impasse is the result. In these circumstances, it is unrealistic to suggest that the parties return to bargaining to address two minor issues when it is evident that the critical underlying issue is the genesis of the impasse reached by the parties (see *Peacock Lumber Limited*, [1990] OLRB Rep. May 584, at paragraph 21).

52. In all of the circumstances, does the impasse in this proceeding allow for the appearance that the process of collective bargaining has been unsuccessful? In my view, it does.

53. The responding party makes a valid point when it asserts that it ought to be entitled to attempt to negotiate an individual collective agreement with the applicant that reflects its particular business. These negotiations do not take place in a context similar to those that occur in the ICI sector of the construction industry, in which the terms and conditions of employment are negotiated by employee and employer bargaining agencies on behalf of all unions and employers bound to the ICI agreements. Here, the Act requires the parties to meet and to bargain in good faith and to make every reasonable effort to make their own collective agreement. Of course, there is no guarantee that any collective agreement that results from bargaining will contain the terms and conditions that any one party considered to be critical at the outset of bargaining. But the responding party ought at the very least to be entitled to negotiate as best it can with the applicant in order to conclude a collective agreement containing terms and conditions that "works" for it. And so, of course, should the applicant. That is, the applicant has that very same entitlement. It is entitled to bargain for the collective agreement that "works" for it.

54. The facts of this proceeding establish that the responding party has had an opportunity to bargain such a collective agreement. Although the applicant did show up to the bargaining table with its "standard collective agreement" in hand, it was prepared to make, and has made, alterations to some of the provisions requested by the responding party. As a result, there has been considerable progress made towards reaching a collective agreement. The circumstances here are different from those reflected in *Atway Transportation*, in which the union was not prepared to make any changes to the "standard collective agreement" it brought to the table – even those changes that were fundamental to making the collective agreement applicable to the bargaining unit in question. Here, the applicant has been willing to make changes to certain provisions reflecting its "standard" language when it was asked to do so and those requested changes made sense to it.

55. The applicant has not been willing to move at all with respect to its proposal on pension and benefits contributions. It asserts that the responding party is unwilling to acknowledge that it is an employer in the construction industry. The responding party asserts in response that the applicant is unwilling to acknowledge that the responding party is, more often than not, an industrial employer. Neither party is prepared to move on its position, and the responding party asserts that, like the union in *Atway Transportation*, it is the applicant's intransigence which has led to the situation as it currently stands, and therefore that the application is premature because it is too soon to conclude that collective bargaining has been unsuccessful.

56. I disagree with that assertion. At this point, both the applicant and the responding party have marked their lines in the sand and are not prepared to move. But the applicant's decision-making does not reflect the weaknesses reflected by the decision-making of the union in *Atway Transportation*. Although the responding party fundamentally disagrees with the position taken by the applicant with respect to its proposal on pension and benefits contributions, the position taken by the applicant is legitimately taken, is lawful, and can easily be understood as being in the best interests of the applicant's members working for the responding party. Furthermore, this is not a case where the applicant has not considered or has ignored the structure of the responding party, such as in *Atway Transportation*. The applicant has considered the responding party's structure. It is not ignoring the position taken by the responding party. The applicant just fundamentally disagrees with

the responding party's position that its particular structure ought to alter the applicant's views with respect to how pension and benefits ought to be delivered to its members.

57. With respect to the applicant's position on the pension and benefits contributions, it is important to keep in mind what I will refer to colloquially as the "most favoured nation" clause that is contained in the Sudbury Heavy Civil Agreement. Again, that clause reads as follows:

> Co-Operation
>
> ...
>
> Should the Union enter into any agreement more favourable to any other company performing work similar to that covered by this Agreement, the Union agrees to extend the more favourable conditions to the Company, such extensions shall be considered an amendment to this Agreement.

Because the applicant has utilized the Sudbury Heavy Civil Agreement as a template agreement with respect to a number of its other Northern Ontario bargaining units, this clause is contained in the collective agreements applicable to those bargaining units. Its effect is simple. If the applicant were to provide the responding party with terms and conditions of employment in its collective agreement that were more favourable than those contained in the collective agreements the applicant has with other, third party employers, the latter employers can insist upon taking advantage of those more favourable conditions.

58. The existence of this provision in a number of the applicant's collective agreements in Northern Ontario complicates the bargaining relationship between the parties to this proceeding. It is not the only complicating factor. However, its existence has almost certainly placed the applicant into the position that it cannot compromise at all on certain proposals in its collective bargaining negotiations with the responding party, for fear that the resulting agreement would be determined to contain "more favourable conditions" than its other agreements, and therefore undermine the pension and benefits contributions provisions in those other collective agreements. The responding party argues that the applicant handcuffed itself before bargaining even commenced on the basis that it had previously guaranteed a level playing field for all of its collective bargaining relationships in Northern Ontario, and that this has caused the intransigent position taken by the applicant.

59. The existence of this provision in other collective agreements binding the applicant in Northern Ontario has caused me considerable concern. Having regard to the fact that the remedy available pursuant to section 43 of the Act is not intended to displace the primacy of the collective bargaining process, I am troubled by the possibility that a party could, through its binding agreements with third parties, put itself into the position where it is forced to come to the Board to seek a remedy under section 43 of the Act in order to extract itself from a self-imposed, untenable situation. That is not the purpose of section 43 of the Act. It is not clear to me why an employer (or, for that matter, a union) should be precluded from free collective bargaining regarding all of the terms and conditions of employment relating to its bargaining unit employees merely because of prior promises made by a union (or an employer) to third parties.

60. Here, however, my concern with the existence of the "most favoured nation" provision is alleviated by the fact that the responding party acknowledges that a contractual provision relating to pension and benefits contributions in the nature of that sought by the applicant is contained in

virtually all construction industry collective agreements. The applicant is a trade union that pertains to the construction industry and the certificates it secured were secured pursuant to the construction industry provisions of the Act. It is evident that the applicant's motivation for remaining steadfast with respect to its position on its pension and benefits contribution language has little to do with the "most favoured nation" clause and is driven mostly by the fundamental disagreement between the parties – namely whether for the purpose of bargaining a collective agreement the responding party ought to be considered by the applicant to be both a construction industry employer and an industrial employer. Even in the absence of the "most favoured nation" clause, I am satisfied that the applicant's position regarding its language on the pensions and benefits contributions would be exactly the same as it currently is, as would be, of course, the responding party's position.

61. The applicant and the responding party have reached a deadlock regarding their positions on pensions and benefits contributions. That deadlock is not the result of an intransigent position taken by the applicant. As a result, it appears to me that the process of collective bargaining has been unsuccessful. Accordingly, I turn to the question of whether collective bargaining has been unsuccessful because of any one of the reasons contained within subsection 43(2)(a) to (d) of the Act.

62. Having regard to all of the evidence, I am of the view that the applicant has established that collective bargaining has been unsuccessful because of the refusal of the responding party to recognize the bargaining authority of the applicant. In light of that conclusion, it is not necessary for me to deal with the applicant's assertion that subsection 43(2)(b) of the Act also applies in the circumstances.

63. Mr. Lebeau testified on behalf of the responding party that he was a passionate benefits advocate. He noted during his testimony that the responding party had made considerable advances in its employee benefits programs during the four year period that he has worked with the Mansour Group. Mr. Lebeau's evidence established that the responding party honestly believes that it is in its best interest to maintain a stable workforce, and that it honestly believes that its proposals on the benefits contributions will result in terms and conditions of employment that will maximize the possibility of maintaining such a stable workforce.

64. The responding party's passion for employee benefits has the capacity to be problematic from a labour relations perspective. It became evident during the frank testimony of Mr. Lebeau that to some extent the responding party has become an advocate on behalf of its construction workers who are members of the applicant. This advocacy role has, at least in part, caused the responding party to take the position it has with respect to benefits. Mr. Lebeau testified that one of the responding party's concerns regarding the applicant's proposal on benefits contributions is that each of the responding party's employees would lose his benefits coverage if he did not work the required number of hours performing construction work to trigger coverage. Although this concern was explained in some instances by reference to the consequences of that benefits structure from the perspective of the responding party (that is, the potential loss of long-serving employees and the inability to maintain a stable workforce), it was also explained by Mr. Lebeau on a number of occasions by reference to the responding party's concerns regarding the consequences of that structure from the perspective of its employees. Mr. Lebeau testified to his concern that some of the "inventive" things that the responding party has done to secure advantageous benefits for its employees (the Costco card, for example) would be lost for these employees if the applicant's approach to benefits were agreed to by the responding party.

65. When the responding party adopts these concerns as a basis for its bargaining position it effectively undermines the bargaining authority of the applicant. The applicant has been certified as the exclusive bargaining agent on behalf of its members who are construction labourers working for the responding party in three separate Board Areas in the Province of Ontario. It is entitled to negotiate a collective agreement with the responding party on behalf of those members, and it is entitled to put forward bargaining positions on behalf of those members that it considers appropriate in the circumstances. The responding party need not agree with the applicant's assessment of the appropriateness of the bargaining positions it takes on behalf of its members, but the responding party is not entitled to refuse to accept a position adopted by the applicant on behalf of its members because in its view the applicant's members would be better served by accepting its position. It is not the role of the responding party to advocate on behalf of the members in the bargaining unit. That is the role of the applicant. If the applicant ultimately errs in its assessment, the consequences of such an error are those for the applicant to bear.

66. These same concerns are reflected by the grounds adopted by the responding party for its position on the applicant's pension contributions proposal. The evidence clearly establishes that one of the grounds upon which the responding party is not prepared to accept the pension contributions proposal offered by the applicant is that no other corporate entity in the Mansour Group has a pension, save and except its core corporate entity, Mansour Mining, that has a bargaining relationship with the CAW – Canada. The cost of that pension is one-third of the cost of the pension proposed by the applicant. It is evident from the evidence of Mr. Lebeau that it is a major concern of the responding party that accepting the pension contribution proposal of the applicant would be perceived by employees of its sister companies as providing a better benefit to those of its employees who are represented by the applicant. Mr. Lebeau testified that the goal of the Mansour Group is to have similar benefits in all of its constituent corporate entities.

67. The "inventive" positions taken by the responding party regarding payment of pension contributions have as their main (if not sole) purpose the shielding from the employees of its sister companies the fact that it would be contributing to a pension of considerable value to those of its employees who are members of the applicant. The evidence is unequivocal that this is the case. It is not a question of cost, because there is no dispute that the responding party is prepared to contribute the same amount of money to the applicant and/or its members, as long as the money is not sent by it directly to the applicant's pension trust fund. The real concern of the responding party is that it not be seen by other employees in the Mansour Group as having provided a benefit to the applicant's members that other corporate entities in that Group do not have.

68. Case authority establishes that by adopting a bargaining position on the basis of considerations such as these the responding party finds itself within the scope of subsection 43(2)(a) of the Act. In *Peacock Lumber Limited*, cited above, the Board addressed the assertion that an employer's unwillingness to include within a collective agreement certain wage increases and bonuses, notwithstanding that it had made and paid such increases and bonuses in the past, and appeared willing to make and to pay those increases and bonuses in the future, constituted a refusal by the employer to recognize the bargaining authority of the union.

69. At paragraphs 26 and 27 of the decision, the Board made the following comments:

> 26. … These proposals, together with the respondent's positions on wages and benefits and the Christmas bonus, seem to indicate some difficulty in accepting the role of the union on the part of the respondent. Essentially, the

> respondent's proposal on the key monetary items amounted to either no change, or a reduction in the status quo. In the context of this case, these proposals suggest that the respondent wished to make it clear to the employees that the applicant had obtained no tangible benefits for them, and had even caused a reduction in those benefits. Our concern in this regard is strengthened by the respondent's apparent willingness to continue both its Christmas bonus (although as mentioned earlier, Mr. Vail's testimony was conflicting on this point) and the annual summer wage increase, despite its flat refusal to negotiate these items into the collective agreement. It is difficult to avoid the conclusion in these circumstances that the respondent was attempting to communicate to employees that the union had obtained for them nothing more than the respondent was already providing.
>
> 27. To the extent that these positions reflect an unwillingness on the part of the respondent to reconcile itself to a collective bargaining regime, we think that they amount to a refusal to recognize the union's bargaining authority. We say this despite the fact that the respondent was eventually prepared to sit down and negotiate over a significant number of standard collective agreement provisions. The respondent's key proposals were likely to have the effect of undermining the union's authority and credibility with employees, and the fact that it was willing to agree on a number of other standard provisions does not redeem its conduct in these circumstances.

70. This same observation can be made with respect to the pension and benefits contribution proposal made by the responding party in this proceeding. The position taken by the responding party on the applicant's pension and benefits contribution proposal clearly reflects a difficulty on the part of the responding party to accept the role of the applicant as the exclusive bargaining agent of its construction labourers. Its proposals are in part based upon the desire of the responding party to signal to its employees that the applicant has not achieved any tangible benefit for them, particularly with respect to a pension. The responding party is clearly prepared to pay the cost of the pension benefit, as long as there is no suggestion to any of its other employees that the applicant secured that benefit for the construction labourers employed by the responding party.

71. Although the position taken by the responding party may be justified in part upon its view that it ought not to be considered to be a pure construction employer for the purposes of collective bargaining, it is evident that the responding party is not prepared to acknowledge that the applicant has secured exclusive bargaining rights on behalf of its construction labourers in the Board Areas identified above. The effect of that unwillingness to acknowledge the applicant's bargaining role is to undermine its credibility with its employees.

72. For these reasons, I am of the view that the applicant has established that collective bargaining has not been successful because of the refusal of the responding party to recognize the bargaining authority of the applicant. Subsection 43(2)(a) of the Act authorizes the Board to make the direction sought by the applicant in these circumstances.

73. Accordingly, I hereby direct the settlement of a first collective agreement between the applicant and the responding party by arbitration pursuant to subsection 43(2)(a) of the Act.

2299-09-HS Hastings and Prince Edward Counties Health Unit, Applicant v. Ontario Nurse's Association, Canadian Union of Public Employees, Loralee Idler, Inspector, Responding Parties

Health and Safety – The employer sought a suspension of orders requiring it to provide its health care workers involved in administering the H1N1 vaccine with respirators and eye protection – The Board found that the workers would be nominally safer if they were furnished with the appropriate respirator; prejudice to the employer would be minimal; there was a *prima facie* case for a successful appeal because of the other precautions and protections in place at the employer's premises – The measures adopted by the employer and the expertise of the workers in identifying ill people gave them substantial protection not available to many other public workers – Since the employer could not satisfy all three criteria for a suspension of the orders, the request was denied

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: November 10, 2009

1. The employer requests suspension of an Order made by a purported Ministry of Labour Health and Safety Inspector.

2. By decision dated November 2, 2009, clarified by decision dated November 4, 2009, I abridged the deadline for responses to the request for suspension to be filed. CUPE, ONA and the Inspector filed responses by the deadline. The employer filed reply submissions. This decision determines the suspension request.

3. These applications concern H1N1 Influenza Immunization Clinics in Hastings and Prince Edward Counties which have been vaccinating for high priority groups. The clinics are staffed primarily by members of the Ontario Nurses' Association. The Orders, set out below, are in relation to workers (nurses) who screen clients for Influenza-like illness. The point of the screening exercise is that if patients appear to have influenza they are not permitted to be given a vaccination shot and are sent home.

4. Signage is posted at the front door to all clinics which reads:

> **You will not be vaccinated today if you have:**
>
> 1) A fever or
> 2) An eye allergy.

5. Upon entering the clinic, a greeter directs patients to a hand washing station. Next to the station is a sign which reads:

> **Respiratory illness like the flu spread easily**
>
> **STOP**

Clean your hands.

1. Are you feeling unwell?
2. Do you have a cough?

If the answer to any of these questions is yes: **PLEASE PUT ON A MASK.**

Surgical masks are located directly below the sign.

6. Clients who are unwell are sent, wearing a surgical mask, to another screening area where their temperature is taken by a nurse. If the patients' temperature is greater than 38 degrees celsius they will be sent home.

7. Surgical masks and gloves are available from the greeter and the nurse taking patients' temperature. There are hand-washing stations at the entrance to every clinic, and hand sanitizer is widely available at the clinics.

8. On October 26, 2009, MOL Inspector/Hygienist Loralee Idler, accompanied by MOL Infection Control Consultant Craig Lawrie, inspected the Belleville Clinic. As a result of the inspection, Inspector Idler issued the following four orders:

> 1. Clients are being screened for symptoms of influenza-like illness in areas well inside the building where they can come in contact with unprotected workers not involved in the screening process. The employer shall take the reasonable precaution to protect the health of workers of ensuring that active screening is done by clinic staff as close as practicable to the entrance and ensuring that the screening areas are well-separated from other work areas.
>
>   Compliance date of 30 Oct 2009
>
> 2. Workers who screen clients for influenza-like illness, including clients who self-report as ill, are not provided with eye or respiratory protection. The employer shall take the reasonable precaution to protect the health of workers of providing appropriate respiratory and eye protection for workers who screen clients for influenza-like illness.
>
>   Compliance date of 12 Nov 2009
>
> 3. Workers doing active screening of clients have not been fit-tested to ensure that they can achieve adequate fit with the respirators provided to them. The employer shall take the reasonable precaution to protect the health of workers of providing qualitative or quantitative fit-testing for all workers who may be required to wear respirators.
>
>   Compliance date of 12 Nov 2009
>
> 4. Workers who may be required to wear respirators have not been trained in the care or use [of] respirators. The employer shall ensure that every worker required to wear respiratory protection is trained in the care and use of respirators.

Compliance date of 12 Nov 2009

9. To be clear, the parties agree that the Orders require the employer to provide the workers with an N95 respirator. This respirator requires training for proper use and must be "fit-tested" to every individual who will be wearing one. Some employees with particular facial features will have to have masks specially ordered. The employer has a concern that it may not be able to get enough N95 respirators because there is such a demand for them.

10. The employer challenges the last three Orders (the "Orders"). The employer also asserts that Ms. Idler, a Ministry Hygienist, is not an Inspector under the Act.

11. The factors the Board considers in determining whether to suspend the operation of an inspector's Order are:

> (a) whether the suspension of the order would endanger worker safety;
>
> (b) whether the employer would be severely prejudiced by not suspending the operation of the order; and
>
> (c) whether there is a *prima facie* case for a successful appeal of the order.
>
> (See *R.J. Dungey & Sons Ltd.*,[1999] OLRB Rep. January/February 82 *supra*, at para. 17, and the decisions cited therein.)

Whether the suspension of the Order would endanger workers' safety

12. This question is very difficult to evaluate. On one hand, it is clear that workers would likely be safer, if only barely, with the use of the N95 respirator. Obviously, if the mask is tighter fitting, there is less chance of virus carrying liquid finding its way into the mouth or nose of the worker. The real issue is the magnitude of the benefit. In my view the benefit is likely a small one, perhaps a very small one, but is a benefit nonetheless.

Whether the employer would be severely prejudiced by not suspending the operation of the order

13. The employer advises that the N95 respirators are "more expensive to provide than surgical masks and they must be individually fitted to each worker, adding additional costs".

14. ONA suggests that the employer has estimated that the cost to the employer to provide the N95 respirator is approximately $4,500.00 every four weeks and $1000 for eye protection.

15. The prejudice to the employer is accordingly small.

Whether there is a prima facie case for a successful appeal of the Order

16. The Ministry of Health and Long Term Care on October 27, 2009 published a document "Personal Protective Equipment in Mass Immunization Clinics" which states:

> Active screening should be carried out by clinic staff at the entrance to the clinic itself. Staff members who are performing the screening should have the appropriate PPE (fit-tested N95 respirator and eye protection in addition to Routine Practices) available for use in case an individual with H1N1 has bypassed the passive screening and entered the clinic.

17. In view of the Ministry's position, provision of the respirator would appear to be at least arguably a reasonable precaution.

18. Moreover, it is not at all clear to me, as the employer suggests, that the Ministry must prove "additional risk" to their workers than to any other workers in Ontario. The question is: is the provision of the equipment at issue a reasonable precaution? That can be answered in the affirmative without a finding that other workers in the province are more at risk.

19. It seems to me that the Order is at some level a succumbing to unjustified alarmism. It seems obvious to me that the workers in question are better protected than almost any other group of employees in the province who regularly deal with the public. The measures adopted by the employer and the expertise of the workers in identifying ill people give them substantial protection not available to many other public workers. Moreover, health care workers have priority for vaccination. The end result of all of this, is that to date no workers have became ill. Therefore, I conclude that there is a *prima facie* case for a successful appeal of the Order.

20. Since the suspension of the Order may endanger workers' safety, albeit minimally, and since the employer would not be severely prejudiced by not suspending the Order (except possibly as discussed below) and although it can be said that there is a *prima facie* case for a successful appeal of the Order, I decline to suspend the Order in this case. I make this decision with considerable misgivings. Nevertheless, I decline to suspend the Order because all three criteria in *R. J. Dungey & Sons* have not been met.

21. Having said that, in my view whatever danger there or suspending the Orders is would not justify shutting down the clinics. Therefore, if the employer is unable, using normal efforts, to secure sufficient number of N95 respirators it may advise the Board and the Board will then consider whether the order should be suspended pending obtaining the respirators.

3322-03-R; 2118-04-R Independent Electricity Market Operator, Applicant v. Canadian Union of Skilled Workers, Responding Party v. Ministry of the Attorney General (Ontario), Interested Party; Independent Electricity Market Operator, Applicant v. Labourers' International Union of North America; Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059, Responding Parties v. Ministry of the Attorney General (Ontario), Interested Party

Constitutional Law – Non-Construction Employer – Remedies – The Board found that the IESO met the statutory preconditions for a declaration that it is a non-construction employer within the meaning of s. 127.2 of the Act because although it performs construction

work from time to time, it does no work in the industry for which it expects compensation from an unrelated person – CUSW and the Labourers challenged the constitutionality of the provision, alleging that subsections 127.2 (1) and (2) violate their members' freedom of association (s. 2(d) of the *Canadian Charter of Rights and Freedoms)* by substantially interfering with their right to organize and bargain collectively – The Unions also challenged the constitutionality of s. 127.2 (3), which contemplates that their respective collective agreements with IESO cease to apply upon the Board's declaration – The Board held that the Supreme Court's decision in *B.C. Health Services* protected the "procedure" known as collective bargaining, rather than the fruits of the bargaining process, and that protection included the notion of association rather than merely the economic rights of the union – The impugned sections of the Act repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future processes by stripping the unions of their right to have their representations considered by the IESO in a process of good faith bargaining – The interference is substantial such that it constitutes a breach of freedom of association and is not justified under s. 1 of the *Charter* – The challenged provisions go well beyond providing a mechanism for movement from one labour relations regime to another; they end the process of collective bargaining altogether and destroy the product of the exercise of the right of the unions' members to engage in the process – S. 127.2 of the Act declared constitutionally inoperative

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Richard Charney, Daniel R. McDonald* and *Norman Thomas* for Independent Electricity Market Operator; *L. A. Richmond* and *S. Prihar* for Canadian Union of Skilled Workers, Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059; *Rochelle S. Fox* and *Robert Charney* for the Ministry of the Attorney General.

DECISION OF THE BOARD; November 23, 2009

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I. INTRODUCTION

1. Board File Nos. 2118-04-R and 3322-03-R are applications for a declaration that the Independent Electricity Market Operator ("IMO"), which is now referred to as the Independent Electricity System Operator (hereinafter the "IESO"), is a non-construction employer within the meaning of section 126 and 127 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). For ease of reference, the applicant will simply be referred to as the IESO even though it may have been known as the IMO at the relevant time.

2. The IESO seeks a declaration that it is a "non-construction employer" within the meaning of the Act and consequently that the responding parties, Canadian Union of Skilled Workers ("CUSW") and Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council ("LIUNA, OPDC") and Labourers' International Union of North America, Local 1059 (collectively referred to as the "Labourers"), no longer represent employees of the IESO employed in the construction industry.

3. Under the terms of section 126 of the Act, an "employer" and a "non-construction employer" for the purposes of section 126 and sections 126.1 to 168 of the Act are defined as follows:

> "employer" means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;
>
> "a non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person;

4. By decision dated March 3, 2008, the Board found that the IESO met the statutory preconditions for a declaration that it is a non-construction employer. More specifically, the Board found on the evidence before it that, while the IESO performs construction work from time to time, it does no work in the construction industry for which it expects compensation from an unrelated person. The Board did not however make the declaration contemplated under section 127.2 of the Act to the effect that the trade unions no longer represent employees of the IESO employed in the construction industry in view of the Charter challenge raised by CUSW and the Labourers ("the Unions") to the constitutionality of that provision. The Board instead referred these applications for hearing into the constitutional issue.

5. The impugned provisions read as follows:

> **127.2** (1) This section applies with respect to a trade union that represents employees of a non-construction employer employed, or who may be employed, in the construction industry.
>
> (2) On the application of a non-construction employer, the Board shall declare that a trade union no longer represents those employees of the non-construction employer employed in the construction industry.

> (3) Upon the Board making a declaration under subsection (2), any collective agreement binding the non-construction employer and the trade union ceases to apply with respect to the non-construction employer in so far as the collective agreement applies to the construction industry.

Section 127.2 therefore permits a non-construction employer within the meaning of section 126 of the Act to apply to the Board to seek a declaration that a trade union no longer represents its employees employed in the construction industry and that any collective agreement binding the non-construction employer and the trade union ceases to apply with respect to the non-construction employer to the extent that it applies to the construction industry.

6. This decision addresses the Unions' constitutional challenge to section 127.2(1), (2) and (3) of the Act.

II. NATURE OF CONSTITUTIONAL OBJECTION

7. The Unions assert that subsections 127.2(1), (2) and (3) of the Act infringe, deny and are inconsistent with their members' right to freedom of association guaranteed under s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter") in that they operate, at the behest of the employer, to extinguish existing lawful collective agreements and bargaining rights of the Unions and their members. The Unions further argue that these provisions cannot be justified as a reasonable limit under section 1 of the Charter.

8. The relevant provisions of the Charter are as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following freedoms:
>
> a) freedom of conscience and religion;
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c) freedom of peaceful assembly; and
> d) freedom of association.

9. The Unions contend that subsections 127.2(1) and (2) of the Act, under which the Board is required, upon the application of a non-construction employer, to declare that a trade union no longer represents those employees of the non-construction employer employed in the construction industry, substantially interfere with the right of their members to organize and to bargain collectively, a right and freedom protected by s. 2(d) of the Charter. The Unions also challenge the constitutionality of subsection 127.2(3) of the Act, which contemplates that their respective collective agreements with the IESO cease to apply upon the making of the Board's declaration terminating the Unions' bargaining rights for the IESO's employees employed in the construction industry. The Unions submit that subsections 127.2(1), (2) and (3) constitute a substantial interference with the right to organize and bargain collectively, which was recognized by the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 ("*Health Services*") as protected by s. 2(d) of the Charter.

10. The Unions further take the position that the IESO as a government entity is violating the Charter by initiating this application in order to eliminate the presence of construction unions from the IESO without any justification for doing so. The Unions contend that the IESO is doing so for the purpose, or with the effect, of fundamentally denying the s. 2(d) rights of their members. The Unions however note that it is unnecessary for the Board to determine this latter issue if it accepts their primary contention that the impugned provisions breach s. 2(d) of the Charter.

III. ISSUE AND REMEDY

11. The question of whether the IESO is a government entity to which the Charter applies need not, in my view, be determined at all in this proceeding. Even assuming without finding that the Charter applies to the actions of the IESO, it could not be a breach of the Charter for a government entity to initiate an application seeking those declarations unless the declarations contemplated under the impugned provisions themselves give rise to a breach of Charter rights. The issue raised by the Unions' constitutional objection is therefore simply whether the effect of the Board making the declarations contemplated under subsection 127.2(1), (2) and (3) of the Act in the present case amounts to a breach of the s. 2(d) Charter rights of the Unions or their members.

12. In the event that no such infringement is found, it is appropriate to issue the declarations required under section 127.2 given the Board's earlier finding that the IESO meets the statutory preconditions necessary to obtain those declarations. If, however, the challenged provisions are found to violate the Charter in a manner which is not saved by section 1 thereof, the appropriate remedy is to treat the provisions as invalid for the purposes of this proceeding only and to decline to make the declarations contemplated under sections 127.2 of the Act. (*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 17; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257 at para. 44).

IV. FACTUAL BACKGROUND

13. Before turning to a consideration of the constitutional objection, it is useful to provide some background to the proceedings before me and to outline some of the facts relevant to the objection.

(i) The Creation of the IESO on April 1, 1999

14. The IESO was established by the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A (the "EA") on April 1, 1999 as a not-for-profit, non-share capital corporation in the context of a larger restructuring of the electricity market in Ontario. Under the terms of the EA, the former Ontario Hydro, a monopoly generator, transmitter and distributor of electricity, was reorganized effective April 1, 1999 into a number of different entities pursuant to a plan to introduce competition into Ontario's electricity system. While this reorganization is referred to as the "de-merger" of Ontario Hydro, it involved the break-up of Ontario Hydro into separate entities, which had not previously been the subject of a merger. The reorganization of the former Ontario Hydro as it existed prior to April 1, 1999 resulted in the creation of the entities now known as the following: Hydro One Inc. ("Hydro One"), Ontario Power Generation Inc. ("OPG"), the Ontario Electricity Financial Corporation ("OEFC"), the Electrical Safety Authority ("ESA") and the IESO. The EA, generally

speaking, provided for the transfer of officers, employees, assets, liabilities, rights and obligations of the former Ontario Hydro to those newly-created entities.

15. The IESO acquired the employees, assets, liabilities, rights and obligations of Ontario Hydro that were related to the activities carried on as at April 1, 1999 by the Central Market Operator ("CMO") business unit of the former Ontario Hydro. That business unit was responsible for the control and operation of the electricity grid and carried out that responsibility primarily at a facility referred to as the Clarkson Control Centre. The two main functions of the IESO are: 1) to ensure the reliable operation of the electrical power system in Ontario; and 2) to operate the wholesale electricity market in Ontario, which involves a price setting function. The IESO carries out its responsibility of ensuring the reliability of the electrical power system in Ontario by means of market rules and operating agreements with various market participants. The IESO's principal operational facility is also the Clarkson Control Centre where many of its management and non-management employees work overseeing the operations of the electricity grid.

(ii) The origin, and recognition, of the Unions' Bargaining Rights with the IESO

16. The Unions' bargaining rights with respect to construction employees of the IESO at issue in this proceeding originated with the former Ontario Hydro prior to the break-up of Ontario Hydro on April 1, 1999. The International Brotherhood of Electrical Workers ("IBEW") acquired bargaining rights back in 1949 for a unit of electricians and related classifications now represented by CUSW. Those bargaining rights were then transferred to the IBEW, Local 1788 ("Local 1788") in or about 1972. CUSW subsequently acquired those bargaining rights in or about early 1999 following a successful displacement application filed with the Board. The Labourers, for their part, have held bargaining rights since 1949 for a bargaining unit consisting of construction labourers and related classifications of Ontario Hydro. As such, the Unions and their respective predecessors have held bargaining rights with respect to employees of Ontario Hydro for approximately sixty years.

17. Members of CUSW and the Labourers and/or of their respective predecessors performed construction work for Ontario Hydro both as direct employees of Ontario Hydro and as employees of subcontractors to Ontario Hydro. Their work included construction work done by members of CUSW's predecessor, Local 1788, both as direct hires of Ontario Hydro and as employees of contractors to Ontario Hydro at the Clarkson Control Centre during the construction of that facility in or about 1987.

18. Following the transfer of virtually all of the assets and liabilities of the CMO business unit to the IESO under the terms of the EA and the transfer orders, most of the employees of the former CMO business unit, many of whom were represented by the Power Workers' Union ("PWU") and the Society of Professional Engineers (the "Society"), became employees of the IESO. They continued to be responsible for overseeing the operation of the electricity grid. Pursuant to section 69 of the Act, the Unions' bargaining rights with respect to employees of the former Ontario Hydro continued to bind the IESO following the sale of part of Ontario Hydro's business to the IESO at the time the IESO was established by the EA on April 1, 1999.

19. Although the IESO never acknowledged that it was a successor employer to the former Ontario Hydro within the meaning of section 69 of the Act, it was willing to recognize the chosen representatives of its employees. The IESO therefore recognized the bargaining rights of the PWU and of the Society for those employees transferred to it from the CMO business unit. There are

approximately 300 employees of the IESO who are represented by the Society and approximately 50 employees of the IESO who are represented by the PWU. The IESO however refused to recognize the Unions' bargaining rights in respect of construction workers it had never employed. The IESO referred to the fact that it does not employ any construction workers to perform the construction work it requires from time to time, but rather has determined to contract or subcontract out all of its construction work.

20. Given the IESO's refusal to recognize the Unions' bargaining rights, their representatives explored with counsel for the IESO the possibility of having a mediator deal with their claims to bargaining rights with the IESO. A mediator was subsequently appointed and mediation sessions occurred on December 11, 2002, March 27, 2003 and June 3, 2003. The mediation sessions did not result in a settlement, nor did subsequent discussions between the solicitors for the respective parties. Those discussions ended in or about January 2004 when the IESO filed the present application under section 127.1 with respect to CUSW's bargaining rights. Shortly thereafter, on February 16, 2004, separate applications under section 69 and 1(4) were filed on behalf of the Unions in Board File Nos. 3662-03-R and 3663-03-R. In those applications (the "Successor Rights Applications"), the Unions sought a declaration from the Board that there had been a sale of a business within the meaning of section 69 of the Act from the former Ontario Hydro to the IESO.

21. By decision dated July 31, 2006 in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, [2006] OLRB Rep. July/August 594, the Board determined that there had been a sale of part of the business of the former Ontario Hydro to the IESO. In that decision, the Board considered and rejected the IESO's contention that no declaration of a sale of a business should issue because the construction part of the former Ontario Hydro was transferred to OPG and to Hydro One and not to the IESO. In doing so, the Board had regard to the fact that the CMO business unit required construction work to be done (including construction work performed by the Unions) at the Clarkson Control Centre associated with office renovations/reassignments and that that type of construction work continued to arise from time to time after the transfer to the IESO. The Board determined that the bargaining rights relating to the intermittent construction activities of the former business unit of the CMO business ought to be preserved regardless of whether the IESO chooses to perform the work itself or to contract out that work.

22. In view of the determination that there had been a sale of business within the meaning of section 69 of the Act, the Board declared that the Unions' bargaining rights continued in that entity and that the IESO was therefore bound to the collective agreements binding on the predecessor, Ontario Hydro.

(iii) The Unions' Collective Agreements and Bargaining Rights binding on the IESO

23. At the time of the Board's decision in *Ontario Electricity Financial Corporation and Independent Electricity System Operator, supra*, the bargaining rights and collective agreements with the Unions to which the IESO became bound were as follows:

> (1) A collective agreement between the Electrical Power Systems Construction Association ("EPSCA") (of which Ontario Hydro was a member) and the Ontario Power Council of Unions (which comprises certain international unions including the Labourers' International Union

> of North America) dealing with certain construction work on Ontario Hydro property (the "EPSCA Agreement");
>
> (2) The Labourers' Provincial Collective Agreement in the ICI sector of the construction industry in the Province of Ontario between the Labourers International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council and the Labourers' Employer Bargaining Agency (the "Provincial ICI Agreement");
>
> (3) Bargaining rights held by the Labourers' International Union of North America, Local 1059 for all construction labourers in the employ of Ontario Hydro in all sectors of the construction industry, save and except the ICI sector, in Board Area 3 for work performed off Ontario Hydro property;
>
> (4) The bargaining rights reflected in the certificates issued by the Board in *Ontario Hydro and the Electrical Power Systems Construction Association*, unreported decisions dated January 21, 1999 (in Board File Nos. 0214-98-R and 0216-98-R) in respect of a bargaining unit composed largely of electricians and linemen. The scope of the bargaining units described in these certificates was subsequently amended by decision of the Board in *Ontario Hydro and the Electrical Power Systems Construction Association*, unreported decision dated September 15, 1999 (in Board File Nos. 0214-98-R and 0216-98-R). The bargaining rights reflected in these certificates issued to the LIUNA, OPDC were subsequently transferred to CUSW.

24. It bears noting at this stage, given that one of the stated purposes of the non-construction employer provisions discussed in greater detail below is to permit non-construction employers to bargain their construction collective agreements directly rather than through employer bargaining agencies, that the two collective agreements to which the IESO became bound (i.e. the EPSCA Agreement and the Provincial ICI Agreement), are collective agreements which were negotiated by employer bargaining agencies, rather than directly by the IESO's predecessor, Ontario Hydro. In accordance with the provincial bargaining scheme provided for under the Act and applicable to work performed in the ICI sector of the construction industry, the Provincial ICI Agreement was and is negotiated by a provincial employer bargaining agency on behalf of all employers (including the IESO) for whom the trade union holds bargaining rights in the ICI sector of the construction industry.

25. After the Board issued its decision in the Successor Rights Applications, the IESO bargained construction collective agreements with each of the Unions directly in respect of construction work performed by the IESO in the Electrical Power System ("EPS") sector, which accounts for the majority of the IESO's construction work. The IESO's representatives advised the Unions that the IESO was bargaining because it had been ordered by the Board to bargain and that the IESO considered its business to be electricity operation and not construction. The IESO retained the services of a consultant with experience in construction industry collective agreements to lead its bargaining given its lack of in-house experience in that area. The IESO also made it clear during the course of bargaining that it would not be hiring construction workers, but rather would be contracting

out all of its construction work, and that it wanted the flexibility to use the contractor of its choice. The bargaining between the IESO and the Unions took place over a period of approximately 500 hours and resulted in the settlement of two collective agreements.

26. The Principal Agreement between the IESO and LIUNA, OPDC ("LIUNA/IESO Agreement") was finalized first on January 24, 2007. The recognition clause to that agreement provides that the IESO recognizes LIUNA, OPDC as the exclusive bargaining agent for a bargaining unit engaged in the construction of new facilities, additions to existing facilities and major modifications, rehabilitations and reconstruction of existing facilities performed by the IESO with its own employees on IESO property for the EPS sector. LIUNA, OPDC holds bargaining rights for construction labourers and related classifications of construction workers of the IESO.

27. The Principal Agreement between the IESO and CUSW was finalized on June 18, 2007 ("CUSW/IESO Agreement"). Under the scope clause in that agreement, the IESO recognizes CUSW as the exclusive bargaining agent for a bargaining unit comprised of specified electrical classifications (i.e. electrical journeyman) engaged in all construction industry work performed by the IESO with its own employees on IESO property in the EPS sector.

28. A significant issue in both of the bargaining sessions leading to these agreements concerned the IESO's ability to contract out work of the bargaining unit and, more specifically, the conditions associated with its ability to do so. Both of these collective agreements allow the IESO to contract or subcontract work of the bargaining unit to construction contractors subject to certain conditions.

29. Under the LIUNA/IESO Agreement, contracting and subcontracting is, generally speaking, permitted provided that the construction contractors or subcontractors are either in contractual relations with LIUNA, OPDC or agree to be bound to the terms of the agreement when performing work contracted out. In the latter scenario, the contractor or subcontractor is required to sign Appendix E to the LIUNA/IESO Agreement, which appendix requires the contractor or subcontractor to use members of LIUNA, OPDC to perform the construction work and to be bound to and apply all of the terms, conditions, practices, understanding, amendments and renewals of the LIUNA/IESO Agreement while performing the work of the bargaining unit. (See LIUNA/IESO Agreement, Ex. 23, ss.2Ai, 2E, 3A and Appendix E). The LIUNA/IESO Agreement therefore permits the IESO to contract or subcontract the work of the bargaining unit on the condition that members of the Labourers obtain the work under the terms and conditions set out in the applicable Labourers' collective agreement.

30. Under the terms of the CUSW/IESO Agreement, planned work of the bargaining unit which is contracted out must generally be performed by contractors who are either signatories to a collective agreement with CUSW or who agree to sign Appendix E to the CUSW/IESO agreement, unless CUSW is unable to supply qualified members within a certain period of time. The labour requirements clause at Appendix E to the CUSW/IESO Agreement, in turn, requires a contractor or subcontractor to use members of CUSW and to apply all of the terms, conditions, practices, understanding, amendments and renewals of the CUSW/IESO Agreement while performing the work. The CUSW/IESO Agreement however also permits the IESO in certain specified circumstances to use contractors who are in contractual relations with other unions using non-CUSW members provided that the IESO requires such contractor to sign a labour requirements provision which stipulates minimum standards consistent with the IESO/CUSW Agreement.

31. The IESO seeks, through these applications, to terminate these two collective agreements negotiated directly with the Unions as well as the Provincial ICI Agreement as it relates to ICI construction work performed by the IESO. The IESO also seeks, through these applications, to end its on-going obligations to negotiate future agreements with the Unions, subject to the Unions' ability to re-establish their respective bargaining rights with the IESO under the general provisions of the Act.

32. While the Ministry of the Attorney General (Ontario) ("AG") suggests that the issue of whether the termination of the IESO's collective agreements with the Unions violates the Charter is moot because the LIUNA/IESO Agreement and the CUSW/IESO Agreement both contemplate that they are in effect until April 30, 2009, I cannot accept that suggestion. In this regard, I note that both of these agreements also provide that they will automatically renew from year to year if no notice to bargain is given within a specified period time and there is no information before me to suggest that that did not, in fact, occur. In addition, the challenged provisions would, in any event, still operate to terminate the Provincial ICI Agreement as it relates to the IESO prior to the expiry of its term on April 30, 2010. In the circumstances, I reject the suggestion that it is moot to consider whether the proposed declarations terminating construction collective agreements binding the IESO and terminating existing collective bargaining rights violate the Charter rights of the Unions and their members.

(iv) The IESO's Construction Activities and its Use of the Unions' Members to date

33. As noted, the IESO requires construction work associated with office renovations/rearrangements to be performed from time to time at the Clarkson Control Centre. According to the undisputed evidence of Joe Mulhall, president of CUSW and former president of Local 1788, there is no difference between the construction work done at the Clarkson Control Centre before and after the IESO was created in 1999. The IESO also caused a substantial amount of construction work to be performed at the Clarkson Control Centre in the period between October 2001 and August 2002. This work was done in connection with the expansion of that facility referred to as the "West Wing expansion".

34. The IESO is an owner and a consumer of construction services. It can either direct hire construction workers or contract out its construction work as it chooses. Since its inception, the IESO, unlike its predecessor, Ontario Hydro, has never employed any members of the Unions directly. The IESO's construction work has been performed thus far by contractors engaged by the IESO and paid for by the IESO. Members of the Unions have therefore performed work for the IESO as employees of subcontractors to the IESO.

35. Since the IESO has only engaged members of the Unions to perform work through contractors, the IESO has never directly contributed to the Unions' pension or benefit funds. The work performed by members of the Unions as employees of contractors to the IESO has however resulted in pension and benefit contributions to plans funded by all the employers who employ the Unions' members.

36. The amount of work performed by members of the Unions for the IESO to date is relatively small when compared to the total amount of work they have respectively performed in the same period of time for all other unionized contractors combined. For example, in the case of the Labourers, there are currently approximately 80,000 dues paying members. They performed a total of

approximately 42,625,309 person hours of work in the construction industry in Ontario between February 2007 and June 2008. Members of the Labourers performed a considerable amount of work at the IESO in connection with the West Wing expansion to the Clarkson Control Centre, but have not performed any work for the IESO since that project was completed in 2002.

37. In the case of CUSW, its members performed a total of approximately 1000 hours of work for the IESO as employees of Murray's Electrical, a subcontractor engaged by the IESO. That work was performed in 2007 and 2008. By contrast, the total number of person hours worked by members of CUSW for all other contractors combined in the period from June 2007 to June 2008 was approximately 1.6 to 2 million. In 1998, CUSW had approximately 1040 dues paying members.

38. According to Mr. Mulhall, each employer bound to an agreement with CUSW (such as the IESO) makes up part of the sum of the employment opportunities for its members. Mr. Mulhall also testified that what matters to CUSW's members in its collective bargaining relationship with the IESO is that the IESO is another employer which provides employment opportunities for CUSW members on the out-of-work list. Those employment opportunities contribute to what makes it viable for CUSW's members to continue to participate in CUSW's labour pool. The Unions' members' needs for ongoing work opportunities are met by having as many employers as possible contractually bound to an agreement with the Unions so that they can obtain the work opportunities of those employers whenever they arise.

39. Even though the opportunities available for construction work at the IESO cannot be clearly identified in advance, there can be no doubt that the IESO will need to perform construction work from time to time. Whether it will require a significant amount or only a small amount is difficult to gauge and likely depends on whether it decides to build new facilities or renovate existing ones.

40. The job opportunities, and benefit contributions made in respect of work performed by the Unions' members at the IESO would be lost if the Unions' bargaining rights for the IESO and collective agreements with the IESO were terminated, unless the IESO voluntarily chooses in all cases to engage contractors in contractual relations with the Unions despite no longer having any contractual obligation to do so.

(v) Significance of Hiring Hall, Contracting and Subcontracting Provisions to the Unions' members in the Construction Industry Context

41. It is common ground that employment in the construction industry differs from employment in an industrial establishment given the episodic nature of construction industry work. The majority of construction collective agreements consequently contain hiring hall provisions which have been negotiated by construction trade unions as a means of allocating work to their members and of ensuring continuity of work for them. Contracting and subcontracting provisions also play an important role in addressing the concerns of construction workers for ongoing employment opportunities when they are laid off from one job and are looking for new employment through the union's hiring hall.

42. Both Mr. Mulhall and Mr. Harold Bartlett, a business representative for LIUNA, OPDC, testified as to their belief that in the absence of the protective language negotiated by the Unions in their respective collective agreements with the IESO in the form of contracting and subcontracting

provisions, the Unions' members would not be awarded construction work by the IESO, or at a minimum would have fewer opportunities for such work. As such, the Unions maintain that their members' interests are impacted by the outcome of this case in terms of their work opportunities; i.e. the opportunity to earn wages, benefits etc.

43. Mr. Mulhall and Mr. Bartlett both testified that the fundamental reason that construction workers join trade unions is to obtain access to some kind of continuity of work through the trade union's hiring hall in order to obtain employment and benefits. They also noted that negotiating contracting and subcontracting protections for members of CUSW and its predecessor Local 1788 and for members of the Labourers became increasingly important to the Unions and their respective members as Ontario Hydro and its successors increasingly moved away from direct hire employment of construction workers to performing more and more of their construction work using subcontractors.

44. Mr. Mulhall also referred to the struggle that CUSW and its predecessor, Local 1788, had in order to obtain job security protections for their members in the face of this increasing use by Ontario Hydro and its successors of contractors to satisfy their construction requirements. Since those earlier efforts often took place in litigation before the Board, much of that history is already set out in various Board decisions (See for example, *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Feb. 70 ("Bill 80" case) and *Ontario Power Generation Inc.* [2000] OLRB Rep. May/June 533 (June 20, 2000).

45. Briefly, CUSW obtained bargaining rights for electricians previously represented by Local 1788 following internal struggles amongst the IBEW and its locals for jurisdiction over electrical work contracted out by Ontario Hydro. While members of Local 1788 had the right to work contracted out by Ontario Hydro for a period of time, they lost that right when Local 1788's jurisdiction was restricted to representing only direct hires of Ontario Hydro. Local 1788's inability to maintain job security protections for its members in the face of Ontario Hydro's increasing use of contractors prompted the move from Local 1788 to CUSW.

46. As noted in *Ontario Power Generation Inc., supra*, at page 541, and also referred to by Mr. Mulhall in evidence, contracting, and subcontracting protections were significant issues for CUSW in its bargaining with the entities comprising the former Ontario Hydro. In the case of OPG, CUSW brought a first contract application to the Board before it was eventually successful in obtaining those protections for its members in bargaining. In the case of the IESO, CUSW, like the Labourers, was required to bring their respective Successor Rights Applications to the Board before the IESO would even enter into collective bargaining negotiations with it. Ultimately, however, both Unions were able to obtain the contracting, subcontracting and job security protections in their respective collective agreements with the IESO referred to above. It should be noted that those protections were ultimately obtained through the Unions' collective bargaining negotiations with the IESO and not through any applications to the Board.

47. According to Mr. Mulhall, the CUSW/IESO Agreement applies to both employees of the IESO and to employees of its contractors and does not provide a "closed shop" type arrangement typically negotiated in collective agreements in the ICI sector, under which the employer can only contract or subcontract work to employers in contractual relations with the union. CUSW recognized in bargaining the IESO's interest in having access to the broadest possible pool of employers to bring that competition to the workplace. Mr. Mulhall also noted that the contracting and subcontracting

language negotiated by CUSW with the other successor entities to Ontario Hydro varies in direct response to the needs of the entity in question and of CUSW's members.

48. Contracting and subcontracting provisions were also significant issues in bargaining the LIUNA/IESO agreement. Mr. Bartlett testified that those provisions were vital to members of the Labourers because the IESO had made clear that it was not interested in engaging direct hires. According to Mr. Bartlett, the Labourers would not have concluded an agreement with the IESO without obtaining those protections.

49. To illustrate the significance of those provisions to members of construction trade unions, Mr. Bartlett referred to his own experience as a former construction worker and former member of Local 1788 employed at times as a direct employee of Ontario Hydro and, at other times, as an employee of a contractor to Ontario Hydro. His work during that time included work for several contractors at the Clarkson Control Centre during the initial construction of that facility, which was done using a combination of direct hires of Ontario Hydro and contractors to Ontario Hydro. According to Mr. Bartlett, Local 1788's hiring hall was his means of maintaining continuity of work. He would finish a job for one contractor and then go to the hiring hall to look for the next job. The hiring hall was therefore his "lifeline for putting bread and butter on the table" and the contracting and subcontracting language in the applicable collective agreement is what kept him employed through the job opportunities it protected.

50. Because of these protections negotiated by the Unions, the Unions' members are, generally speaking, indifferent to whether the employer/owner, such as the IESO, chooses to do the work with direct hires or to do the work with contractors since the terms and conditions of their work are the same in either case. According to both Mr. Mulhall and Mr. Bartlett, there is also no difference for a construction worker between working for a "construction employer" as opposed to a "non-construction employer". The work is the same and their members have all of the same bargaining issues and concerns when engaged in collective bargaining with a "construction employer" or with a "non-construction employer". As demonstrated in the most recent bargaining sessions between the IESO and the Unions, the contracting and subcontracting provisions remain of vital significance to the Unions' members given the IESO's desire to contract out its construction work and their members' interest in protecting future work opportunities.

51. The importance of hiring hall provisions and of contracting and subcontracting protections in the construction industry context is well-known to the Board and is reflected in the Board's jurisprudence and in academic literature dealing with construction labour relations. Contracting and subcontracting in the construction industry represents a threat to the bargaining rights of a union and the job security of its members. Subcontracting clauses in a collective agreement, which are directed to preserving work opportunities for union members, are designed to protect against that threat. In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board made the following observations concerning their purpose in the construction industry context:

> 35. … the Board recognizes that, in the context of the construction industry, a sub-contracting clause may serve a purpose parallel to that of the union shop, or union dues provision, in the industrial setting. Both types of clauses can be construed as attempts by trade unions to enhance their strength as collective entities. At this point, however, the comparison ends. Union security in the industrial setting appears to refer primarily to provisions, such as union shop clauses and dues shop clauses, which serve to

> ensure that all members of the bargaining unit contribute to the financial support of the bargaining agent. In the construction industry, on the other hand, union security appears to be more related to contractual provisions recognizing the union's claim to particular work, i.e., the sub-contracting provisions. These provisions appear to be primarily directed at preserving a union's work jurisdiction so that it can continue to provide work for its members. The construction union in so doing is then able to maintain its own strength as a collective entity.
>
> 36. The object of a sub-contracting clause is to preserve the work jurisdiction of the trade union which is the beneficiary of the clause. ….

52. The evidence before the Board in this case concerning the particular nature of work in construction industry and the particular concerns of construction industry workers including of the Unions' members, to a large extent, echoes the Board's own description of the unique shape of labour relations in the construction industry set out in the following passages in *Arlington Crane Service v. Ont. (Min. of Labour)*, (1988) 67 O.R. (2d) 225 commencing at p. 233:

> The pattern of construction work is erratic. When any one project is complete, there is no guarantee that there will be another job for the contractors to move on to.
>
> The result of this erratic pattern of construction work is that it is uneconomical for large firms to develop a permanent work-force organized into departments of specialists each with its own supervision. From the point of view of the entrepreneur, while he might retain a small number of key employees, it makes more business sense to hire the bulk of his employees as and when he wins a new contract, keep them on his pay-roll while they do that specific work, but when that job is finished, terminate their employment. When a new job comes up, a new crew will be recruited, one which only by accident will be the same as the previous project. Meanwhile that earlier crew has split up and has gone off to work for other trade contractors who have projects of their own.
>
> The character of the employment relationship in the construction industry is very different from that in the typical plant.
>
> There is no opportunity for the kind of tenured status which employees enjoy under most collective agreements outside of the construction industry. As well, there is no basis for the kind of enduring association which a group of employees can develop in an industrial bargaining unit. Any one job for the construction worker is usually short and fleeting, and must be prepared to be highly mobile, shifting from project to project across a wide geographic area.
>
> …
>
> Since the relationship between employer and employee in construction is typically episodic rather than enduring in character, a special form of union organization has emerged to fill that vacuum. The major craft specialties have all developed their own trade unions; the union is the body with which the individual tradesmen tend to have the most salient relationship in the industry. The union has often taken the lead in the development and operation of apprenticeship programmes which are

> necessary to train newcomers in the skills of the trade. As well, the union collects and administers the funds for the worker's vacation pay, health and welfare benefits, and retirement pensions (with the money coming from the numerous contractors for whom the tradesman may have worked during the year, at a defined contribution level for each hour worked).

Given the particular nature of work in the construction industry, the fact that the IESO does not have the same connection with the Unions' members who have performed its construction requirements from time to time as it does with its permanent workforce represented by the PWU or the Society is not unique either to the IESO or to non-construction employers. Rather, the lack of an enduring connection between individual tradespeople and the entities which require their construction services from time to time is common and arises as a result of the typically episodic nature of construction industry work.

53. The interests of construction workers in joining a trade union to represent them and their concerns in collective bargaining also reflect the particular nature of the industry in which they work. Those interests and concerns referred to in the evidence of Mr. Mulhall and Mr. Bartlett are aptly described in the following passages of Woods, H.D. (1973), *Labour Policy in Canada* (2^{nd} ed.). Toronto: MacMillan of Canada commencing at page 252:

> From the point of view of industrial relationships, the bargaining unit on a given construction site which is represented in negotiations is dissolved as a contract comes to an end. And while it might be argued that it is inconceivable to think of an employer as having obligations to recognize a union when he has no employees, it is important to remember that the workman has a continuous need for income and for some kind of income and for some kind of predetermined wage and hours standards and work rules. The influence that a union may assert on the terms and conditions of work on a given construction site will undoubtedly be of benefit to the workmen it represents, but if they have no carry-over to other sites but must be established all over again, those who undertake these construction occupations will be subjected to almost intolerable uncertainties and severe stress.
>
> We refer to construction workers as employees, and in a technical and legal sense they are. But the relationship between those workers and their employers and managers is so different from that found in more stable industrial situations that the use of the term 'employee' to describe both can be misleading. Because of the very nature of the construction industry, the relationship between employer and employed more closely resembles the simplistic description conveyed by the expression 'labour market' than in perhaps any other employer-employee relationship. The union, in these circumstances, takes on the appearance of a labour-broker, supplying applicant employers with the necessary men of the appropriate qualifications. … In the extreme, the contractor 'buys' his labour through the union hiring hall.
>
> **The Union and the Disappearing Unit – Search for Stability**
>
> The lack of long-run continuing relationships between employer and employed in the construction industry has the effect of increasing the importance of the employee-union relationship. The union, as the only

> permanent institution to which the employee can attach himself, must assume a much more vital role in the designing and maintenance of the personnel policy than is the case in other industries. ...
>
> The unions recognize that the individual employer usually has a short-run interest in those who work for him on a given construction site. Consequently, they seek to develop union policies which focus attention on job-rights and security, and on wage-rates. Job security they attempt to promote by laying claim to specific tasks as 'belonging' to the trade they represent and by operating hiring-halls under their own control. The first of these devices is intended to ensure that the available work within their definition of the trade will be reserved for the members of the trade. The second is intended to establish a system of work allocation among those who are qualified in union terms to perform these tasks.
>
> ...
>
> **Subcontracting as a Threat**
>
> The system of subcontracting which operates in the construction industry may also threaten the bargaining rights of a union and the work security presumed to have been acquired through a collective agreement signed by a union and a contractor. If the contractor is free to subcontract part of the work, or all of it, to others whose employees are not represented by the union, the original bargaining unit can be largely, or completely, replaced by employees represented by no union or by one other than the union which signed the original agreement. In either case, what the union achieved through bargaining has been lost through the subcontracting system.
>
> Construction unions have sought to prevent this by including in agreements clauses which protect their bargaining rights and work jurisdiction.

The unique nature of employment relationships in the construction industry and the means used by construction unions to address their members' concerns for job security through the hiring hall system and subcontracting protections was not the subject of dispute between the parties. The parties however differ on the bearing of those facts to the constitutional issue.

54. The Unions, for their part, urge the Board to consider the evidence and its own knowledge of, and expertise in, construction labour relations as part of the context within which to assess the effect of the impugned non-construction employer provisions on the collective bargaining rights of their members in this case.

55. The IESO and the AG, on the other hand, note that the unique nature of labour relations in the construction industry is precisely why the Legislature has chosen, through the non-construction employer provisions, to remove "non-construction employers" for the most part from the specialized construction labour relations regime designed to deal with the particular labour relations concerns and needs of the construction sector. The IESO and the AG therefore suggest that those facts are not the appropriate context within which to assess the legislation as it relates to a "non-construction employer", such as the IESO.

(vi) Specialized Construction Industry Regime under the Act and the Introduction of the Non-Construction Employer Provisions

56. The particular labour relations concerns arising in the construction industry led to the creation of a separate labour relations regime for the construction industry in Ontario as well as in other provincial jurisdictions in Canada. In 1962, the Ontario government passed *The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62 c. 68, which created special provisions for regulating labour relations in the construction industry. Although there have been various amendments to the legislation since that time, including most notably the introduction in 1977 of province-wide collective bargaining in the ICI sector of the construction industry, the provincial legislation has continued since then to provide a specialized construction industry labour relations regime separate from the general provisions of the statute (*Ontario Hydro*, [1997] OLRB Rep. January/February 82 at para 27; *Empire Continental Management Inc.*, [2008] OLRB Rep. January/February 21 (January 29, 2008) at paras. 67-69; see also *The Honourable Mr. Michael Harris Premier of Ontario*, [2001] OLRB Rep. May/June 767 (May 28, 2001) for a discussion of the background to regulation of collective bargaining in the construction industry, commencing at para. 28).

57. The construction industry provisions are set out at sections 126 to 168 of the Act. They operate in addition to the general provisions of the Act and, generally speaking, prevail over the general provisions to the extent that they conflict with them (Section 126.1(1) of the Act; *Ontario Hydro*, cited above, at paras 38 and 46).

58. The non-construction employer provisions of the Act were first introduced in 1998 by Bill 31, *An Act to promote economic development and create jobs in the construction industry, to further workplace democracy and to make other amendments to labour and employment statutes* ("Bill 31"). The amendments originally defined a "non-construction employer" as "a person not engaged in a business in the construction industry or whose only engagement in such a business is incidental to the person's primary business." Under the terms of the legislation, the construction industry provisions of the Act would no longer apply to those meeting that definition unless a trade union already represented employees who were employed, or who may be employed in the construction industry.

59. That legislation also provided a mechanism by which those non-construction employers who were already unionized in the construction industry could apply to the Board to end their collective bargaining obligations with the trade union in respect of their construction industry employees. After the passage of Bill 31, section 127.2(2) of the legislation provided as follows:

> **127.2** (2) On the application of a non-construction employer, the Board shall declare that a trade union no longer represents the employees of the non-construction employer employed in the construction industry, if on the day the application is made, the non-construction employer does not employ any such employees represented by the trade union.

The effect of this provision was to terminate the bargaining rights of the trade union in respect of employees of a non-construction employer employed in the construction industry and to end the application of the construction industry provisions of the Act to that employer.

60. The Board adjudicated five applications for such a declaration under the provisions of Bill 31 (*Reitmans (Canada) Ltd.*, [2000] OLRB Rep. September/October 1014 (December 13, 2000); *Toronto-Dominion Bank*, [2000] OLRB Rep. November/December 1240; *Shell Canada Ltd.*, [2001] OLRB Rep. Jan./Feb. 146 (February 7, 2001); *Great Atlantic and Pacific Co. of Canada*, [2002] O.L.R.D. No. 2974 (September 12, 2002); *Cadillac Fairview Corp.*, [2002] OLRB Rep. Nov./Dec. 987) December 18, 2002. The first two of those applications involving Reitmans (Canada) Ltd. and the Toronto Dominion Bank were granted having regard to the Board's finding that the applicant employer met the definition of a non-construction employer as it was then defined in the statute. The other three applications were dismissed following a finding in each case that the applicant did not meet the statutory definition.

61. The definition of "non-construction employer" in the Act was subsequently amended by *The Labour Relations Amendment Act, 2000* ("Bill 139") in 2000 to reflect its current wording. An employer can meet the terms of the new definition if it either does no work in the construction industry or if it does work in the construction industry but does not expect to receive compensation from a third party for that work (*Don Park Inc.*, [2001] O.L.R.D. No. 4895 (December 13, 2001) at para 16). Section 127.2(2) of the Act was also amended at that time to reflect its current wording, which, as noted above, provides that, "on an application by a non-construction employer, the Board shall declare that a trade union no longer represents those employees of the non-construction employer employed in the construction industry". The Act therefore continues to permit a non-construction employer as redefined by Bill 139 to apply to the Board for a declaration terminating the bargaining rights of a trade union in respect of its employees working in the construction industry.

62. The effect of the current non-construction employer provisions and the Legislature's purpose in enacting them were considered by the Board in *Hudson's Bay Co.*, [2002] OLRB Rep. May/June 398 (May 28, 2002). In that case, the Board dealt with one of the first applications brought under the current definition of non-construction employer. The Board described the proper interpretation and purpose of the provision in the context of its earlier case law and, in that regard, noted that what the Legislature had changed under Bill 139 was as significant as what it had not changed. Since the Legislature had made no amendment to the definition of "employer" or "construction industry" under section 126 of the Act, the Board in *Hudson's Bay Co., supra*, determined that the earlier jurisprudence interpreting who is an employer in the construction industry remains relevant. In that connection, the Board referred to its longstanding jurisprudence, which established that, in interpreting the phrase "person who operates a business in the construction industry" in the definition of "employer" under section 126 of the Act, no distinction is to be made between vendors of construction services and those who effect construction for their own benefit by engaging contractors (see paras 45-47 in *Hudson's Bay Co.*, cited above).

63. The Board in *Hudson's Bay Co., supra*, however made the following observations concerning the distinction which the Legislature sought to make under the amended "non-construction employer" provisions between those who will continue to be covered by the specialized construction provisions and those who will not:

> 48. But there is no doubt that the Legislature intended to draw some distinction between employers who will continue to be covered by the construction industry provisions and those who will not. The first definition of "non-construction employer" required the Board to analyze the relationship between the employer's businesses outside the construction industry, and the business in the construction industry operated by the

> employer, to determine if the construction business engaged in was "...incidental to the person's primary business". The amended definition focuses the Board's attention elsewhere.
>
> 49. First, as both parties agree, an employer can operate a business in the construction industry to an unlimited degree if it is doing work for itself, or for its own benefit, whether by directly hiring employees or engaging contractors, and meet the definition of "non-construction employer". But in contrast, as counsel for the employer accepted, if the employer is doing any construction work for an unrelated person from whom it expects compensation, that employer remains an "employer" whose labour relations will continue to be governed by the construction industry provisions of the *Labour Relations Act*.

The current definition therefore reflects the Legislature's intention to distinguish between employers who operate a business in the construction industry (whether by hiring employees or by engaging contractors) exclusively for their own benefit and those who operate such a business in the construction industry to any degree for an unrelated person from whom such an employer expects compensation.

64. The following nine applications were adjudicated before the Board under the current non-construction employer definition: *Don Park Inc.*, cited above; *Hudson's Bay Co.*, cited above; *Shell Canada Products*, [2002] OLRB Rep. July/August 729 (August 20, 2002); *Windsor-Essex Catholic District School Board*, [2002] OLRB Rep. Sept./Oct. 971 (October 17, 2002); *Alcan Inc.*, [2003] O.L.R.D. No. 2497 (July 17, 2003); *Commercial Alcohols Inc.*, [2004] O.L.R.D. No. 2119 (April 21, 2004); *Greater Essex County District School Board*, [2004] O.L.R.D. No. 1559 (June 24, 2004); *Greater Essex County District School Board*, [2009] OLRB Rep. January/February 65 (February 26/09); *Independent Electricity Market Operator*, [2008] OLRB Rep. March/April 210 (March 3, 2008). Of those applications, the declarations sought were granted in respect of three applicants: the Windsor-Essex Catholic District School Board, Commercial Alcohols Inc. and the Greater Essex County District School Board. As noted above, the Board in the present proceeding has also determined that the IESO meets the current definition and therefore meets the statutory preconditions for a declaration terminating the Unions' bargaining rights and collective agreement obligations.

65. The current "non-construction employer" definition in the Act has also been considered by the Board in the context of certification proceedings. In *ReNu Recycling Inc.*, [2007] OLRB Rep. January/February 177 (January 26, 2007), in a proceeding involving an industrial certification application and a construction certification application, the Board found that the responding party met the current statutory definition of a "non-construction employer" in that it does not expect compensation from an unrelated party for the construction work it performs. As a consequence of this finding, the Board dismissed the construction certification application before it on the basis that such an application could not be brought in respect of a "non-construction employer".

66. Similarly, in the certification proceedings in both *Amica Mature Lifestyles Inc.*, 2009 CanLII 15068 (ON L.R.B.) and *Labourers' International Union of North America v. 2095527 Ontario Limited (Embassy Suites)*, 2009 CanLII 48742 (ON L.R.B.), the Board expressly found that it was appropriate to address whether a responding party to a construction certification application meets the statutory definition of "non-construction employer" under the Act. In doing so, the Board in *Amica Mature Lifestyles Inc.*, cited above, concluded that it had jurisdiction to entertain whether

the responding party to a construction certification application is a "non-construction employer" before bargaining rights are established in such an application. In *2095527 Ontario Limited c.o.b. as Embassy Suites, supra,* the Board determined that the Act, in fact, requires that the alleged status of the responding party as a non-construction employer be dealt with in the context of an application for certification brought under section 128.1 of the Act. In doing so, the Board noted, at paragraph 19 of that decision, that the Act permits access to certification under section 128.1 of the Act only if a "construction trade union" files an application for certification relating to a "construction industry employer" – which by definition excludes a "non-construction employer".

67. The definitions of "non-construction employer" and "employer" under section 126 of the Act have accordingly been interpreted as precluding a trade union from seeking certification for a "non-construction employer" under the construction certification provisions set out in section 128.1 of the Act.

68. The Unions in this proceeding challenge only the constitutionality of subsections 127.2(1),(2) and (3) of the Act, and not the constitutionality of any of the other non-construction employer amendments to the Act. There is, for example, no issue in the present proceeding about the constitutionality of the definitions of "non-construction employer" and "employer" under section 126 of the Act. As noted, those provisions have been interpreted as operating to prevent a trade union from seeking certification for employees of a non-construction employer under the construction industry provisions of the Act and as preventing a "non-construction employer" that is not already unionized in respect of the construction industry from having its labour relations regulated under the specialized construction industry provisions of the Act.

69. What is at issue in the present proceeding is not therefore all of the "non-construction employer" provisions introduced by the Legislature. Rather, it is only the effect of subsections 127.2(1), (2) and (3) of the Act on *existing* bargaining rights which is challenged. The Unions' contention in this proceeding is that the effect of the impugned provisions on their *existing* collective agreements and their *existing* bargaining rights violates their members' right to freedom of association under the Charter. While the Unions do not take issue with having their collective bargaining relationship with the IESO governed by the general provisions of the Act, rather than by the specialized construction industry provisions of the Act, they object to the legislated termination of their lawfully negotiated collective agreements and of their collective bargaining rights with the IESO pursuant to section 127.2(1), (2) and (3) of the Act.

V. BRIEF OUTLINE OF THE POSITIONS OF THE PARTIES

70. The Unions contend that the declarations to which the IESO is entitled under section 127.2 substantially interfere with the *process of collective bargaining*, which was recognized to be constitutionally protected under s. 2(d) of the Charter in *Health Services*. The Unions point out that the Supreme Court in *Health Services* made clear that legislation which interferes with the right to join, or to be represented by a trade union or which substantially interferes with collective rights is contrary to s. 2(d) of the Charter. That decision also indicates that legislation which nullifies provisions of a collective agreement may substantially interfere with the process of collective bargaining.

71. Section 127.2, in the Unions' submission, not only interferes with the collective bargaining process, but is a "sledgehammer" which destroys the process of collective bargaining

altogether both retrospectively and prospectively. It does so by nullifying every collective agreement provision already negotiated by the Unions on behalf of their members during past processes of collective bargaining. Section 127.2 also, according to the Unions, destroys the process of collective bargaining in the future by requiring the Board to declare that the Unions' bargaining rights in respect of the IESO are terminated upon a finding that the IESO meets the statutory definition of a "non-construction employer".

72. While the IESO and the AG suggest that collective bargaining under the general provisions is still possible, the Unions ask rhetorically who they are supposed to bargain with after the declarations contemplated under section 127.2 are made, since the IESO is no longer required to listen to them. They also note that, with the loss of their bargaining rights and the fruits of those bargaining rights, being their collective agreements, comes the loss of work for their members and the loss of the Unions' ability to ensure that their members obtain construction work contracted out by the IESO.

73. The Unions submit that the workers in *Health Services* lost very substantial rights such as their contracting out language and consequently lost a lot of work, but they still had their collective agreements and on-going bargaining rights. By contrast, under the terms of section 127.2, everything that the Unions and their members have is taken away, including both substantive provisions of their collective agreements, such as union security, subcontracting language, wage provisions and union recognition, and non-substantive provisions. The provisions also remove the Unions' right to bargain in the future. The Unions argue that the purpose or effect of the non-construction employer declarations mandated by section 127.2 is to deny the section 2(d) Charter rights of workers by eliminating construction unions from the IESO altogether and that the impugned provisions are "union-busting" as that term was used by the Court in *Health Services,* cited above. The Unions therefore argue that the constitutional violations in this case are even more compelling than were those in *Health Services*.

74. The Unions however emphasize that they are not taking the position that section 127.2 is unconstitutional because it precludes certain outcomes of collective bargaining. Their contention is that it is unconstitutional because it dispenses with bargaining altogether by eradicating every provision in all of their collective agreements and ends future collective bargaining.

75. The Unions also argue that it is no answer to a Charter breach to say that the Unions can mitigate the effects of that breach by seeking to re-establish their bargaining rights and collective agreements with the IESO under the general provisions of the Act. The Unions, in any event, argue that, based on the current Board authorities, it is not at all clear that construction workers, performing construction work for a non-construction employer could be certified under the Act at all. In this regard, they refer to the impact of the Board's decision in *Ontario Hydro,* [1997] OLRB Rep. January/February 82, which they note was recently affirmed in *Empire Continental Management,* [2008] OLRB Rep. January/February 21 (January 29, 2008) ("*Empire*"), on the ability of any union to organize a unit of construction workers employed by a non-construction employer under the general provisions of the Act.

76. The Unions further contend that, even if it is theoretically possible for the Unions to seek re-certification for a unit of construction workers under the general provisions of the Act, the Unions could only do so in respect of the IESO if there were at least two construction workers employed by the IESO in the proposed bargaining unit on a particular day. Given the IESO's stated intention not

to employ construction workers directly, the result of the impugned provisions in this particular case is that the Unions' members who currently have collective bargaining rights with the IESO will lose their right to a process of collective bargaining forever. The IESO has to hire construction workers before the Unions and their members can regain access to collective bargaining and, in the meantime, the Unions and their members have lost everything they bargained, including the right to send members to work as well as their right to bargain with the IESO. The Unions submit that in the circumstances the alleged right to start over under the general provisions is entirely illusory.

77. The Unions nonetheless argue that whether they could or could not in theory apply to be certified under the general provisions of the Act is irrelevant to the alleged Charter breach in this case. Their collective agreements and bargaining rights would still be terminated by the legislation at the behest of the employer.

78. The Unions also point out that they are indifferent to whether the general provisions or the construction industry provisions apply to their labour relations with the IESO. They submit that, if the goal of the legislation is to transfer their labour relations to the general provisions, that objective could have been achieved simply by a declaration that their labour relations with a non-construction employer, such as the IESO, are now governed by the general provisions of the Act. In those circumstances, there would be no impact on their collective agreements and collective bargaining relationship with the IESO other than in respect of the ICI sector.

79. The Unions further argue that all that was required to remove their labour relations from the provincial bargaining scheme of the Act applicable in the ICI sector was a declaration that non-construction employers and the affected trade unions are no longer bound to the Provincial ICI Agreement and are required to negotiate a separate agreement. In this regard, the Unions refer to the type of provision found at section 57 of the Act, which addresses the removal of an employer from representation by an employer association and contemplates that the trade union and the employer will bargain separately in the next round of bargaining. According to the Unions, it was unnecessary for the Legislature to have nullified all of their collective agreement provisions and terminated all of their established bargaining rights to have achieved the objective of transferring their labour relations with the IESO to the general labour relations regime.

80. The Unions further submit that the purpose of the legislation identified by the AG, being to correct the situation where a non-construction employer is bound to collective agreements in the construction industry it had little opportunity to influence, does not justify such a disproportionate impairment of their right to collective bargaining. The impugned provisions do not simply remove non-construction employers from the ICI scheme under which collective agreements are negotiated by provincial bargaining agents rather than by employers directly. They permit non-construction employers to rid themselves of their collective agreement obligations and their collective bargaining obligations altogether without any consultation with the affected unions. According to the Unions, the challenged provisions thereby "maximally" impair their members' right to collective bargaining.

81. Finally, the Unions submit that the parties opposite have not identified any pressing and substantial concern which might justify such substantial interference with their collective bargaining rights. The Unions note the references made by certain politicians when the legislation was passed to the fact that it is less expensive to do construction work non-union and that it is not fair to non-construction employers to be bound to construction collective agreements. The Unions however submit that permitting certain employers to get their construction work done more cheaply is not a

pressing and substantial concern which can justify a Charter violation. In the circumstances, the Unions ask that the Board decline to make the declarations contemplated by the provisions.

82. The IESO, for its part, points out that the Board in *Greater Essex County District School Board*, [2005] OLRB Rep. March/April 281 (April 20, 2005) ("*Greater Essex*") found that the non-construction employer provisions of the Act were constitutional only four years ago, which was after the release of the Supreme Court's decision in *Dunmore v. Ontario (Attorney General)*, (2001) 207 D.L.R. (4th) 193 ("*Dunmore*"). According to the IESO, that decision was fundamental to the subsequent decision of the Supreme Court in *Health Services* and *Health Services* was an affirmation of *Dunmore* - not a departure from it. The IESO submits that the Board should therefore follow its earlier determination in *Greater Essex* absent compelling reasons, which it says do not exist in this case.

83. The IESO also refers to the presumption of constitutionality and suggests that deference should be accorded to the Legislature's choice given that the Act has been amended twice since the non-construction employer provisions were first introduced and that the current government chose not to make any further amendments to those provisions when it introduced changes to the Act under the *Labour Relations Statute Law Amendment Act* (Bill 144), which came into effect on June 13, 2005.

84. The IESO also notes that one of the purposes of the non-construction employer provisions is to achieve a transfer from the specialized construction regime to the general regime under the Act and that the Charter does not guarantee access to any particular regime. The IESO argues that the Legislature is entitled to regulate the boundaries of the specialized construction regime designed to address the particular needs of that unique industry. According to the IESO, the Legislature is entitled to adjust the line of demarcation between the construction and non-construction regime from time to time and the Board should not micro-manage how the Legislature has chosen to effect that transfer.

85. While the IESO acknowledges that the Charter applies to more than employment relationships, it notes that the Charter does not apply to economic or commercial endeavours. The IESO argues that the context of the present constitutional challenge involves powerful trade unions attempting to maintain a monopoly supply of labour for their members and does not involve the total exclusion of a historically disadvantaged group from a labour relations regime in Ontario.

86. In particular, the IESO notes that the evidence of Mr. Mulhall and of Mr. Bartlett to the effect that the purpose of construction unions is to provide employment opportunities for their members and that the reason that construction workers join unions is for access to jobs refers to their members' economic or commercial interests and not their constitutional rights. The IESO also suggests that the Unions are seeking to protect particular outcomes of collective bargaining and to protect their members' economic interests. The IESO points out that the Charter does not guarantee particular outcomes in the collective bargaining process, such as contracting, subcontracting and work guarantee protections, and does not protect economic interests.

87. The IESO further argues that the Unions have not satisfied their onus of establishing that there has been a substantial interference with collective bargaining in this case. According to the IESO, since it does not directly employ any construction workers, there is no evidence before the Board that the legislative provisions impair anyone's right to bargain collectively with their employer. The IESO also submits that substantial interference refers to a complete and permanent ban or

prohibition on collective bargaining. However, what has been lost in the present case is only temporarily lost, since the Unions can seek to recertify the IESO under the general provisions of the Act should the IESO ever directly hire construction workers in future. According to the IESO, the legislation does not therefore result in a permanent prohibition on collective bargaining over any particular issue.

88. The IESO however acknowledges that the legislation requires the Unions and their members to take an additional step to re-establish collective bargaining rights should the opportunity to do so ever present itself. The IESO argues that the impugned provisions therefore, in fact, enhance the dignity of workers and workplace democracy, since if the IESO hires construction workers in future their wishes will be tested before bargaining rights are re-established, something which, it notes, has not occurred for years. As such, the IESO argues that the additional step, which needs to be taken by the Unions and their members to access the alternate model provided by the Legislature under the general provisions of the Act, is consistent with the Charter and its values.

89. The IESO also contends that, even if the Board were to find that there has been substantial interference in the circumstances of this case, the Board still needs to inquire as to whether any duty to consult (referred to in *Health Services*) and negotiate has been respected. The IESO submits that, even though the Legislature is not bound by any duty to consult, the fact that there was consultation in this case is relevant to whether the legislation is saved by section 1 of the Charter.

90. The IESO suggests that the parties in the present case have engaged in a long-running good faith negotiation and consultation process, which reached impasse. In this regard, it refers to the evidence concerning the mediation sessions held to resolve the Unions' claim to bargaining rights in respect of the IESO. The IESO also refers to the Board-adjudicated non-construction employer applications, which took place once impasse was reached, and to that adjudicative process as "consultation" for the purposes considered in *Health Services*. With respect to the issue of "consultation", the IESO also points to various submissions made to the Legislature by officials of different trade unions commenting on both Bill 31 and Bill 139 before they were passed. According to the IESO, the situation in the present case is therefore significantly different from that before the Court in *Health Services* in which the government as employer amended the legislation without consultation and in a manner which permanently interfered with collective bargaining rights.

91. In the IESO's submission, any breach of the right to freedom of association in this case is saved by section 1 of the Charter. The IESO asks the Board to bear in mind the context of the legislation which deals with polycentric interests, rather than a bipartisan issue, and to consider the fact that a labour relations system needs to be defined and limited. The IESO further submits that the Legislature is entitled to deference in the manner in which it has sought to achieve its objective of changing labour relations regimes for non-construction employers. It is further, in the IESO's submission, unfair to prevent the employer from ever being decertified where, as here, the IESO does not employ directly any construction workers, who could seek decertification, and the IESO has no plans to do so.

92. According to the IESO, the legislative objective in enacting the non-construction employer provisions is to redefine at the margins the definition of employer in the construction industry to better reflect who truly acts as a construction contractor and to preserve the right of employees to certify their employer through a representation process if they wish to do so. The IESO also submits that the impugned provisions are designed to transfer labour relations from one

jurisdiction to another with a view to permitting non-construction employers to tender their construction work in a non-discriminatory way; i.e. to union and non-union contractors alike. The IESO however points out that there is nothing in the legislation to indicate that the Unions cannot bargain about contracting and subcontracting protections if the Unions are certified under the general provisions of the Act.

93. The IESO also suggests that it would have been inappropriate for the Legislature to have addressed only the ICI sector of the construction industry since accreditation of employer bargaining agencies can occur in other sectors as well. As such, bargaining by employer bargaining agencies, rather than by the employer directly, can take place in any sector of the construction industry. In addition, the IESO argues that it would have been inappropriate for the Legislature, when effecting the transfer of labour relations regimes, to continue bargaining rights premised historically on a construction regime, since those bargaining rights could have been established either by voluntary recognition or by certification under that regime. The IESO therefore argues that there is a rational connection between the legislative objectives and the means chosen by the Legislature to achieve them and that the means chosen are proportionate.

94. The AG also emphasizes that there are various different statutorily defined labour relations regimes for specific workplaces, including a regime for teachers, for college professors, for police officers and civil servants, and for construction workers. According to the AG, all of these regimes are themselves constitutional and it is not a constitutional violation for the government to decide which unions, employees and businesses should be part of which regime. In the present case, the two regimes in issue are the one provided for under the general provisions of the Act and the one provided for under its construction provisions. According to the AG, section 127.2 is the statutory mechanism by which the Legislature seeks to fine-tune, through a Board-adjudicated process, which businesses are properly part of which regime, and provides the mechanism for movement from the construction regime to the general regime.

95. While the AG acknowledges that the Unions in this case contend that they are not asserting a right to remain regulated by the construction industry provisions, the AG suggests that this is, in fact, the effect of their claim that section 127.2 of the Act violates the Charter. In this respect, the AG refers to the fact that the concept of the government's right to create different labour relations regimes requires the Legislature to enact a mechanism such as section 127.2 of the Act, which permits movement between different regimes.

96. The AG further notes that, while there may be some uncertainty as a result of the decision in *Health Services* as to precisely what is protected by s. 2(d) of the Charter, it is clear from the Charter case law that s. 2(d) does not protect either the right to a particular labour relations regime or to any particular substantive outcome of collective bargaining. Instead, s. 2(d) of the Act protects only a right to a process of collective bargaining and that right is violated only where the legislation substantially interferes with it.

97. The AG suggests that the Unions have failed to establish that such a substantial infringement has occurred in this case for the following three reasons.

98. First, section 127.2 of the Act does not affect the right of any person directly employed by the IESO to bargain collectively with their employer on fundamental workplace issues, since all of the unionized employees of the IESO continue to be represented either by the PWU or by the Society.

According to the AG, an analysis of the principles underlying the Supreme Court's finding in *Health Services* that s. 2(d) protects the right to collective bargaining leads to the conclusion that there must be a direct relationship between an employee and an employer with direct control of the workplace.

99. The AG acknowledges that the Supreme Court of Canada also indicated that context is important in assessing the scope of the right to freedom of association. The AG however contends that it is inappropriate to import into a Charter analysis a construction industry understanding of who is an employee in the construction industry. The AG submits that that context is particularly inappropriate in view of the Board's finding that the IESO is a non-construction employer. Although the AG acknowledges that the Court in *Health Services* used the term employees and workers interchangeably and that they were one and the same in that case, it cautions the Board from expanding the understanding of what s. 2(d) is supposed to protect to include employees of contractors or members of trade unions on an out-of-work list, particularly in the context of this case which concerns a non-construction employer.

100. Second, the AG submits that, even if the Board were to adopt an expansive definition of employee for the purposes of the s. 2(d) right to a process of collective bargaining, the Unions have failed to adduce any evidence to demonstrate that section 127.2 substantially impairs that right, since there is no evidence to suggest that any employees of the IESO or even any members of the Unions would be unable to engage in collective bargaining under the general provisions of the Act.

101. According to the AG, there is an alternative process which is constitutionally compliant and only speculation by the Unions that they would not be able to bargain collectively under the general provisions. As noted by the Board in *Greater Essex*, cited above, any ambiguity in the legislation would have to be resolved in a manner which is compliant with the Charter. In the AG's submission, if the declarations sought are made by the Board, the Unions and their members are in precisely the same position the applicants in the Court of Appeal's decision in *Fraser v. Ontario (Attorney General)*, (2008) 92 O.R. (3d) 481 wished to be; i.e., they are protected by a constitutionally-compliant labour relations regime.

102. Finally, the AG submits that there is no substantial interference with the right to a process of collective bargaining in this case simply because section 127.2 terminates the IESO's collective agreements with the Unions as well as their bargaining rights. According to the AG, the effect of what the Unions are seeking when they ask to maintain their collective agreements is a right to a particular outcome of collective bargaining. In addition, the AG argues that it is only substantial interference which constitutes a violation of s. 2(d) of the Charter and the invalidation of a provision in a collective agreement does not necessarily constitute substantial interference.

103. The AG submits that what was fundamental to the Supreme Court's finding in *Health Services* that the legislation substantially interfered with the process of collective bargaining in that case was section 10 of the *Health and Social Services Delivery Improvement Act* S.B.C. 2002, c. 2 ("HSSDIA"), which precluded future bargaining on certain important issues and thereby undermined future collective bargaining processes. According to the AG, the fact that the legislation in that case invalidated certain collective agreement provisions did not, on its own, amount to substantial interference.

104. The AG also argues that the context of that case was very different from the present one, since it was clear that the Legislature in that case was seeking to interfere with collective agreement

provisions, whereas, in the present case, the challenged provisions deal with changing labour relations regimes and not terms and conditions of employment. It is further, in the AG's submission, irrational for the legislation to continue the Unions' bargaining rights and collective agreements under the construction regime even after the employer has been found to be in the wrong regime.

105. The AG points out that the Legislature is not required to seek the least intrusive measure to achieve its objectives. It is sufficient to choose one of several means, which is what it did in this case. The AG also argues that the termination of the Unions' bargaining rights is in fact consistent with workplace democracy, which is a fundamental pillar of the s. 2(d) right to a process of collective bargaining. According to the AG, workplace democracy usually manifests itself by having a majority of employees in the bargaining unit certify a union to represent them.

106. In sum, the AG takes the position that there is no substantial interference with the process of collective bargaining in this case, since everyone can still collectively bargain in a constitutionally compliant regime with his or her employer. An infringement occurs only where collective agreement provisions are nullified and there is no future bargaining permitted over certain substantive issues. In any event, however, the legislation is, in its submission, rationally connected to the Legislature's objective of transferring labour relations from one regime to another and this has been achieved through legislation of general application, and in a manner which represents one of several least intrusive measures to meet its objectives. The AG also notes that the legislation does not unilaterally end bargaining rights and collective agreements. That result is achieved only after a Board-adjudicated process.

VI. DECISION

107. The issue raised by the constitutional objection in this case is whether the rights of the Unions and/or their members to freedom of association under s. 2(d) of the Charter would be violated if the Board were to make the declarations required under subsection 127.2 of the Act.

108. It is common ground between the parties that the onus of establishing that the challenged provisions infringe the s. 2(d) rights of the Unions and/or their members in the circumstances of this case rests with the Unions who challenge the constitutionality of the legislation. There is also no issue that, if such infringement has been established, the onus shifts to the IESO and the AG to establish that the infringement is justified under s. 1 of the Charter. As noted by the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at page 178, "[i]t is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement."

109. In addressing these issues, I will start by outlining the scope of the right to freedom of association as it has been applied and interpreted in the collective bargaining context. I will then consider the extent to which the present Charter challenge has, as the IESO submits, already been appropriately determined by the Board in *Greater Essex*, or whether, as the Unions argue, the challenge arises from the expanded understanding of the right to freedom of association in the collective bargaining context articulated by the Supreme Court in *Health Services*, which issued after the Board's decision in *Greater Essex*. I will also address more generally whether the challenged provisions breach the s. 2(d) Charter right to freedom of association as that right has been applied and interpreted, and if so, whether the violation is saved by section 1 thereof.

(i) The Scope of the Right to Freedom of Association in the Collective Bargaining Context

110. The interpretation of the appropriate scope of the right to freedom of association under s. 2(d) of the Charter in the collective bargaining context has evolved and expanded over time. In a trilogy of cases decided in 1987, the Supreme Court held that the guarantee of freedom of association under s. 2(d) did not protect either a right to strike or a process of collective bargaining (See *Reference re Public Service Employee Relations Act (Alta.),* [1987] 38 D.L.R. (4th) 161 ("*Alberta Reference*"), *PSAC v. Canada,* (1987) 38 D.L.R (4th) 249 and *R.W.D.S.U v. Saskatchewan,* (1987) 38 D.L.R. (4th) 277.

111. The main reasons were set out in *Alberta Reference*, in which the constitutional challenge related to legislation providing for compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. The Court's reasons for finding that s. 2(d) did not protect the right to strike or the right to bargain collectively included the view that the right to strike and the right to bargain were not fundamental rights or freedoms, but rather were simply rights created by legislation. In addition, the Supreme Court was of the view that recognition of such rights would run contrary to the principle of judicial restraint in interfering with government regulation of labour relations (*Alberta Reference, per* Le Dain J., writing on behalf of himself, Beetz and LaForest JJ., at p.234).

112. Shortly after this trilogy of cases issued, the scope of the section 2(d) right in the collective bargaining context was summarized in the following often-quoted passage from the judgement of Sopinka, J. in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner),* [1990] 2 S.C.R. 367 ("*PIPSC*") at pp.401-2:

> Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s.2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s.2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

This relatively narrow conception of the right meant that there was constitutional protection accorded to forming an employees' association to address workplace issues without interference by management, but there was no corresponding obligation on management to listen to, or bargain with, such an association.

113. Years later, in *Dunmore*, the Supreme Court broadened the scope of the right protected under s. 2(d) having regard to a purposive approach to its interpretation. The issue in that case concerned whether legislation which excluded agricultural workers from collective bargaining under the Act violated the right of agricultural workers to freedom of association guaranteed under s. 2(d). In reviewing the authorities addressing the scope of the right, Bastarache J. noted that the purpose of s. 2(d) was first articulated in the labour trilogy and has been used to define both the "positive" freedom to associate, as well as the "negative" freedom not to, and that McIntyre J. in *Alberta Reference*, cited above, stressed the unique power of associations to accomplish the goals of individuals.

114. Bastarache J., in *Dunmore*, also referred to the extensive review of the s. 2(d) jurisprudence by Wilson J. in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, in which the purpose of s. 2(d) was described as "…the collective action of individuals in the pursuit of common goals". Having regard to the purpose of the Charter protection, Bastarache J. suggested an expanded understanding of the range of activities protected by s. 2(d), as follows at p. 213:

> [16] As these *dicta* illustrate, the purpose of s. 2(d) commands a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which 1) are not protected under any other constitutional freedom, and 2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be *collective* in nature, in that they cannot be performed by individuals acting alone. …
>
> [17] As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (*see R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of the individual". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection … It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.
>
> …
>
> [18] In sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* (see *Egg Marketing*, *supra*, *per* Iacobucci and Bastarache JJ., at para.111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference*, *supra*, *per* Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct

> evidence or inference, that the legislation has targeted associational conduct because of its concerted or associational nature.

In *Dunmore*, the Court consequently rejected the notion that freedom of association applies only to activities capable of being performed by individuals, since equal treatment of individuals and groups does not necessarily mean that there has been no interference with the "associational aspect" of an activity. The Court recognized that, even though certain activities cannot be performed by individuals on their own, s. 2(d) protection may nonetheless extend to associational activities themselves, but stressed that only the "associational aspect" of an activity, and not the activity itself, is protected by s. 2(d) of the Charter.

115. In *Dunmore*, the Supreme Court also found that, in certain circumstances, s. 2(d) places positive obligations on governments to extend legislative protections to particular groups provided the following three conditions have been met:

> 1. the claim of underinclusion is grounded in fundamental Charter freedoms and not in access to a particular statutory regime;
>
> 2. a proper evidentiary foundation is established to demonstrate that exclusion from a statutory regime permits substantial interference with the exercise of protected s. 2(d) activity; and
>
> 3. the state can truly be held accountable for any inability to exercise that fundamental freedom.

In the case before it, the Supreme Court determined that the agricultural workers were able to satisfy all three of these requirements and distinguished the situation before it from its earlier decision in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 ("*Delisle*") on the basis of the relative powerlessness of agricultural workers. Unlike the RCMP officers at issue in *Delisle*, agricultural farm workers were found to face particular barriers to forming associations such that they were substantially incapable of exercising their right to form associations outside of a statutory framework. When discussing what the Legislature was required to do to protect the agricultural workers, Justice Bastarache stated at paragraph 67:

> … I conclude that at minimum the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms. [emphasis added]

As recently noted in *Mounted Police Association of Ontario*, 2009 CanLII 15149 (ON S.C.) at paragraph 44, what was significant about the Court's determination in *Dunmore* was the Court's acknowledgement that making representations was a protected activity within freedom of association. The Court in *Dunmore* however stopped short of recognizing constitutional protection for the collective bargaining process itself.

116. It was not until the decision in *Health Services* that the Supreme Court concluded that s. 2(d) should be understood as protecting the right of workers to associate for the purpose of advancing

workplace goals through a process of collective bargaining. In doing so, it rejected the holdings in *Alberta Reference* and *PIPSC*, which had excluded collective bargaining from the scope of s. 2(d). Instead, the Court defined the scope of the right to bargain collectively bearing in mind the pronouncements of *Dunmore*, as well as the scope of the right reflected in the history of collective bargaining and in the international covenants entered into by Canada, commenting as follows, at para 89:

> 89. … Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. S. 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. S. 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

The Supreme Court therefore for the first time recognized that the *process* of collective bargaining through which workers band together to reach shared workplace goals is protected by s. 2(d). In doing so, the Court noted that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

117. Having regard to the purpose of the Charter, the history of collective bargaining in Canada, and Canada's adherence to international documents recognizing the right to collective bargaining, the Supreme Court rejected the grounds advanced in its earlier decisions for the exclusion of collective bargaining from protection under s. 2(d). It consequently found that the right under s. 2(d) places constraints on the Legislature's power to interfere with the collective bargaining process and protects against "substantial interference" with the associational activity of collective bargaining. It described the test for determining whether state law or action substantially interferes with the activity of collective bargaining, as follows:

> 92. To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith

> collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.
>
> 93. Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> 94. Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiations.

The Supreme Court's focus on the importance of the matter affected to the process of collective bargaining is related to its view that interference with bargaining over less important matters is likely to fall short of discouraging the capacity of union members to come together and pursue common goals. By contrast, the more important the subject matter, the more likely interference with collective bargaining over that issue will affect the ability of the union members to come together and pursue common goals.

118. While the Supreme Court noted that it is not possible to determine in advance precisely what types of matters are of sufficient importance to affect the ability of union members to pursue shared goals, it offered the following examples as general guidance:

> 96. … Laws or state action that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location and availability of parking lots may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining over these matters undermines the capacity of union members to pursue shared goals in concert. Thus, interference with collective bargaining over these issues is less likely to meet the requirements set out in *Dunmore* for a breach of s. 2(d).

As such, in order to amount to substantial interference with the associational activities of collective bargaining, the legislative measure must impact collective bargaining over important issues and also fail to respect the fundamental precept of collective bargaining, which is the duty to consult and negotiate in good faith. Where both of these conditions are met, the constitutional violation will only be permitted if justified under s. 1 of the *Charter*, as a reasonable limit demonstrably justified in a free and democratic society.

119. Following the decision in *Health Services*, the Quebec Superior Court in 2007 and again in 2008 struck down legislation found to infringe section 2(d) rights to freedom of association as it had been interpreted and applied by the Supreme Court in *Health Services*. In *Confédération des syndicats nationaux c. Québec (Procureur general)*, 2007 QCCS 5513 (CanLII), the Court found invalid legislation which predetermined the categories of workers who could constitute a bargaining unit. This was said to amount to substantial interference by the state with the process of collective bargaining because the legislation no longer permits workers who want to associate together to form an association to look after what they consider to be their common interests. It also, in some cases, forces the association of workers whose interests are opposed. The Court in that case further found that the requirement of the legislation which mandated that twenty-six (26) subjects, some of which related to important matters, had to be bargained at a local, rather than a provincial level, amounted to substantial interference with collective bargaining. In that regard, the Court noted that there had been no consultation with the unions concerning which subjects should be negotiated locally.

120. In 2008, the Quebec Superior Court in *Confédération des syndicates nationaux c. Québec (Procureur general)*, 2008 QCCS 5076 (CanLII) also declared unconstitutional legislation which took away the status of certain home care and child care workers as employees. The consequence of the legislation was that those workers lost their right to unionize and collectively bargain and were also denied the protections available to employees under various statutes, such as minimum standards legislation, health and safety legislation and workers' compensation etc. The Court found that the law was adopted to end the unionization movement of these workers and that the Legislature had instead established a process of representation for these workers which depended on the government's good will.

121. In 2008, the Ontario Court of Appeal in *Fraser v. Ontario (Attorney General)*, (2008) 92 O.R.(3d) 481 (application for leave to appeal to the S.C.C. granted April 2, 2009, 2009 CanLII 15013) ("*Fraser*") also considered the adequacy of the legislative provisions under the *Agricultural Employees Protection Act, 1995*, S.O. 1995, c.1, Sch. A, which excluded agricultural workers from the Act but nonetheless provided them with certain protections. The Court of Appeal in *Fraser* found that the legislative provisions applicable to agricultural workers violated the right to freedom of association under the Charter by failing to provide agricultural workers with sufficient statutory protections to enable them to exercise their constitutional right to bargain collectively. In doing so, the Court of Appeal concluded that the combined effect of *Dunmore* and *Health Services* "…is to recognize that s. 2(d) protects the right of workers to organize and to engage in meaningful collective bargaining" and "…that, in certain circumstances, s. 2(d) may impose obligations on the government to enact legislation to protect the rights and freedoms of vulnerable groups." (*Fraser*, at para. 52)

122. Since the claim advanced in *Fraser*, like that in *Dunmore*, involved a positive rights claim under s. 2(d), the Court of Appeal applied the test for assessing such positive rights claims initially laid down in *Dunmore*, and then subsequently expanded in *Baier v. Alberta*, [2007] 2 S.C.R. 673, at para 30 ("*Baier*"). In *Baier*, the Supreme Court confirmed its earlier jurisprudence to the effect that section 2 of the Charter generally imposes a negative obligation on government, and not a positive obligation of protection or assistance. The Court also noted that an exception to that general rule was found in *Dunmore* and that the factors referred to therein were relevant to establishing such an exception. Since the appellants in *Fraser* were similarly seeking a positive entitlement to government action in the form of protective legislation, the Court of Appeal in that case had to consider whether the factors set out in *Dunmore* and *Baier* for challenging under-inclusive legislation had been met.

123. By contrast, the claim advanced by the appellants in *Health Services* did not involve a positive rights claim. It did not therefore require a consideration of whether the factors referred to in *Dunmore* and *Baier* for establishing a positive entitlement to protection had been met. Rather, the challenge by the unions and individual health care workers in *Health Services*, like that made by the Unions in the present case, relates to legislation alleged to affect negatively the appellants' ability to engage in a process of collective bargaining protected under s. 2(d) of the Charter. The factors set out in *Dunmore* and in *Baier* for challenging underinclusive legislation, and establishing an exception to the general rule that section 2 imposes only a negative obligation on government, was not therefore relevant to the challenge made in *Health Services*.

124. With that background in mind, I will now consider the extent to which the present Charter challenge to s. 127.2(1), (2), and (3) has already been dealt with in *Greater Essex*, in which the Board previously considered a constitutional objection to the non-construction employer provisions under s. 2(d) of the Charter as that Charter right had been defined and interpreted in the period after *Dunmore*, but before the decision in *Health Services* had issued.

(ii) To what extent has the Unions' constitutional objection already been addressed by the Board in *Greater Essex*?

125. In *Greater Essex*, the Board dismissed an earlier constitutional objection to the current non-construction employer provisions under s. 2(d) of the Charter, which had been brought by United Brotherhood of Carpenters and Joiners of America, Local 494 ("the Carpenters"). In that earlier challenge, the Carpenters relied heavily on the conclusions and reasoning in *Dunmore*, in which the issue before the Supreme Court concerned the exclusion of agricultural farm workers from coverage under the Act under section 3(b) thereof. As noted, the Supreme Court found that that exclusion substantially interfered with the fundamental freedom of agricultural workers to organize. In reaching that conclusion the Supreme Court considered such things as the inherent difficulties of organizing farm workers and the threats of economic reprisal from employers as well as the message sent by section 3(b) of the Act, which delegitimizes associational activities.

126. The Board in *Greater Essex* summarized the constitutional challenge raised before it to the non-construction employer provisions, as follows commencing at paragraph 5:

> 5. The Carpenters assert that making a declaration that Greater Essex County District School Board ("Greater Essex") and Windsor-Essex Catholic District School Board ("Windsor Essex") are non-construction employers will be detrimental to construction employees, and particularly carpenters, in one of two possible ways. The effect of the legislation, counsel argued, is to exclude construction employees from bargaining separately as a trade, represented by a trade union that typically pertains to the construction industry, and presenting their majority voice, with the result that they will lose the significant economic benefits and trade protections that have been a feature of the special bargaining structures mandated for construction industry employees and trade unions under the Act. These advantages include centralized bargaining, particularly in the ICI sector; subcontracting protections which guarantees work; availability of a hiring hall and vocational training which promotes and enhances work opportunities; and superior wage and economic benefits.

> 6. Alternatively, the Carpenters argued, if the exclusion of construction employees to organize under the Act is not absolute, they will only be represented by a trade union that does not pertain to the construction industry, and they will be limited to inclusion in "all employee" bargaining units. In such units, construction employees will be a minority and their collective bargaining goals will be subsumed and overwhelmed by the demands of the majority, who may not be committed to higher wages for skilled trades, subcontracting protections and the value of vocational training and a hiring hall.
>
> 7. The Carpenters argue that if either of these consequences flow from the declaration that these school boards are non-construction employers, then the legislation deprives the Carpenters and their members from the right to freedom of association, guaranteed in section 2 of the Charter. …

The Carpenters argued that construction industry employees would similarly not have the ability to associate successfully without remaining fully a part of the Act, which governs labour relations in the construction industry. In that regard, the Carpenters maintained that it would not be possible for the construction employees of non-construction employers to be organized under craft lines, by trade unions that pertain to the construction industry under the general provisions of the Act. As such, what the Carpenters contended was unconstitutional about the non-construction employer provisions of the Act in that case was the effect on their members' associational rights which resulted from their exclusion from organizing under the construction industry provisions of the Act and the requirement to do so under the general provisions of the Act.

127. In dismissing the constitutional objection, the Board in *Greater Essex* found that the effect of the non-construction employer declaration in the case before it was to deny the Carpenters and their members their preferred bargaining structure – the ICI Province-wide agreement that pertains to the carpentry trade. The Board however noted that that did not mean that they could not organize and engage in collective bargaining in other structures that are sanctioned by the Act and that the right to freedom of association under s. 2(d) of the Charter had only been found to have been violated where a particularly vulnerable group of workers was entirely excluded from any state-sanctioned organizing structure and where there was a strong evidentiary foundation demonstrating the profound effect of such historical exclusion.

128. The Board in *Greater Essex* did not accept the Carpenters' underlying assumption that construction employees could not be certified and bargain collectively as a craft bargaining unit under the general provisions of the Act, or that, even if certified under the general provisions of the Act, they would be precluded from bargaining in respect of the ICI sector because of section 162(2) of the Act. The Board however declined to presume the outcome of such cases, and instead noted that it would be required when interpreting the Act to be mindful of Charter principles and values and would be required to avoid an outcome that could lead to a breach of the Charter.

129. In dismissing the Charter challenge before it, the Board found that the evidence and argument did not establish that the Carpenters and their members are excluded from any and all state-protected organizing structures and bargaining regimes. The Board therefore concluded that the Carpenters had not laid the necessary evidentiary foundation setting out the consequences of complete exclusion to establish that declaring that the school boards in issue are non-construction employers would result in a violation of s. 2(d) of the Charter.

130. Given that the Carpenters' position in that case was that the general provisions of the Act did not afford them adequate protection to enable them to collectively bargain in a meaningful way, the constitutional objection raised in that case was in substance a positive rights claim made by the Carpenters for entitlement to the protection offered by the construction industry provisions of the Act. In that regard, they relied heavily on the decision in *Dunmore*, which was also a positive rights claim.

131. The arguments raised by the Unions in the present case are, for the most part, entirely different from those raised in that earlier challenge. In the present case, the Unions stress that they are not seeking to maintain access to the specialized construction provisions of the Act, nor do they object to having their existing bargaining rights and collective agreements governed by the general provisions of the Act. They are not therefore seeking access to a particular collective bargaining model or regime. Rather, they take issue with the alleged negative consequence that the challenged provisions have on their existing right to a process of collective bargaining and to their existing collective agreements, which agreements they note were the result of past processes of collective bargaining. In this regard, they rely on the Supreme Court of Canada's interpretation of the right to freedom of association under s. 2(d) of the Charter articulated in *Health Services*.

132. In order to assess whether a right claimed is a positive one or a negative one, "…the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity" or, alternatively, whether the appellants "…seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement." (*Baier*, at para 35).

133. In *Greater Essex*, the Carpenters claimed that the government was required to provide for their inclusion in the construction industry bargaining regime in order to permit them to collectively bargain in a meaningful way with non-construction employers. They therefore claimed a positive entitlement to protective legislation under the construction industry provisions of the Act. Their claim was akin to the claim made in *Baier v. Alta, supra,* in which the appellants challenged legislative amendments to the *Local Authorities Election Act,* R.S.A. 2000, c. L-21 ("LAEA"). In *Baier*, the legislative amendments in issue restricted access of school board employees from running for election as school trustees in the jurisdiction in which they were employed. The amendments therefore restricted who had access to the platform of school trusteeship for expressive activity, which engaged section 2(b) of the Charter. The Court in that case found that the claim made by the appellants was a positive one despite the fact that the appellants were seeking to maintain access to a prior platform for expressive activity.

134. In the present case, however, the Unions, unlike the Carpenters in *Greater Essex*, are not seeking a positive entitlement to government action such as inclusion in a particular collective bargaining regime, to which they previously had access. Unlike the Carpenters, they do not insist on maintaining their access to the protective legislation under the specialized construction industry provisions of the Act in order to permit them to exercise properly their right to freedom of association. Instead, the Unions in the present case seek freedom from government legislation provided for under s. 127.2, which provides for the nullification of their lawfully negotiated collective agreements and the termination of their collective bargaining rights. The Unions object only to the alleged negative consequence of sections 127.2(1), (2) and (3) of the Act, which are said to substantially interfere with their right to engage in a process of collective bargaining.

135. It is only the alleged negative effect of section 127.2 on the Unions' collective agreements and collective bargaining rights which is challenged. It is not therefore correct to say that the Unions are seeking access to a particular collective bargaining regime or that they are seeking to establish a positive right to protective legislation when they take issue only with the negative consequence of the legislation on their members' constitutional right to a process of collective bargaining. The right they claim is, in my view, the right to freedom from the alleged negative consequence of 127.2(1), (2) and (3) on their right to a process of collective bargaining with the IESO.

136. The criteria considered by the Board in *Greater Essex*, and articulated in *Dunmore*, for establishing a positive entitlement to government action are not therefore relevant to the present challenge. It is, for example, unnecessary for the Unions to establish in the present case that their members are inherently vulnerable workers who require state protection in order to exercise their right to freedom of association. Instead, in view of the nature of the challenge raised by the Unions, which does not involve a claim for entitlement to protective legislation, the relevant criteria are those considered by the Supreme Court in *Health Services* when it also assessed a claim concerning the alleged negative consequences of legislation on the appellants' right to freedom of association under section 2(d) of the Charter.

137. In sum, the Board in *Greater Essex* considered an entirely different type of challenge when it considered the Carpenters' contention that the non-construction employer provisions violated section 2(d) of the Charter because it deprived them of their positive entitlement to collective bargaining under the scheme set out under the construction industry provisions of the Act. The Board also considered the challenge to the non-construction employer provisions before the jurisprudence had evolved to recognize that the right to freedom of association under s. 2(d) of the Charter includes a right to a process of collective bargaining.

138. The Unions' contention that sections 127.2(1), (2) and (3) of the Act substantially interfere with their s. 2(d) right to a process of collective bargaining as recognized for the first time in *Health Services* therefore remains to be considered.

(iii) The findings in *Health Services* regarding legislative interference with s. 2(d) rights

139. Since the issue before the Court in *Health Services* is most analogous to the alleged constitutional violation in the present case, it is useful to review the facts and findings of the Court in some detail.

140. The impugned legislative provisions in that case were enacted by the B.C. government under the HSSDIA, which was meant to address a crisis of sustainability in the health care sector in that province. That legislation undid certain provisions of settled collective agreements and also removed certain issues from the scope of future bargaining. The Supreme Court concluded that ss. 6(2), 6(4) and 9 of the HSSDIA were unconstitutional because they infringed the right to collective bargaining protected under s. 2(d) and could not be saved under s.1.

141. Sections 4 and 5 of the HSSDIA, which altered the provisions in collective agreements for transfer and reassignment of employees, were also found to interfere with collective bargaining when read in conjunction with s. 10. That latter provision, generally speaking, declares void a collective agreement which conflicts with the provisions of HSSDIA to the extent of the inconsistency. Sections 4 and 5, in conjunction with s. 10, were found to render future collective bargaining over

transfers and reassignments largely meaningless, since it is meaningless to bargain over an issue which cannot ever be included in a collective agreement. This interference with collective bargaining was not however found to be substantial since the provisions contemplated relatively minor modifications to existing schemes for transferring and reassigning employees.

142. The Supreme Court concluded however that ss. 6(3), 6(5) and 6(6) of the HSSDIA, which deal with the status of employees and the recognition of successorship rights where business is contracted out by the original employer, do not interfere with s. 2(d) Charter rights. Those provisions made it less likely that a health sector employer will be considered to be the "true" employer with obligations to the union and its members if work is contracted out. They also prevent employees from retaining their collective bargaining rights with the subcontractor, which they would otherwise have done under ss. 35 and 38 of the *Labour Relations Code*, R.S.B.C. 1996, c.244 (the "B.C. Code"). These provisions were however held not to infringe the protection over collective bargaining offered by s. 2(d), since they simply modify the protections available under the B.C. Code, and did not deal with entitlements of employees based on collective bargaining.

143. By contrast, sections 6(2), 6(4) and 9, which concern contracting out and layoff and bumping, were found to interfere substantially with the s. 2(d) right to freedom of association. Under s. 6(2), the employer was afforded increased power to contract out non-clinical services. The effect of s. 6(2) when combined with s. 10 was found to invalidate provisions in the health care sector collective agreements restricting the right of management to contract out work. Further, s. 6(4) when combined with s. 10 was said to invalidate any provision of a collective agreement that required an employer to consult with a trade union prior to contracting out work of the bargaining unit.

144. Section 9 of HSSDIA dealt with layoff and bumping but applied only to collective agreements up until December 31, 2005. Pursuant to s. 9, collective agreements could not contain provisions dealing with certain aspects of layoff and bumping during the period from enactment to 2005. Section 9 was consequently held to constitute interference with both past and future collective bargaining even though the interference was limited to the period between the enactment of the Act and December 31, 2005. Sections. 6(2), 6(4) and 9 were further all found to interfere with one of the most essential protections provided to workers by their union, since those provisions address the capacity of employees to retain secure employment and/or to gain employment security.

145. In addressing whether ss. 6(2), 6(4) and 9 nonetheless preserve the processes of collective bargaining, the Supreme Court considered exclusively how the provisions affect the process of collective bargaining and consultation with unions. Even taking into account the situation of exigency facing the government when the legislation was passed, the Supreme Court determined that the measures adopted by the government in the legislation amounted to a virtual denial of the s. 2(d) right to a process of collective bargaining. In that regard, it noted that s.6(2) provided an absolute prohibition on any restriction to contracting out and s. 6(4) went further by making void any collective agreement provision requiring consultation with the unions before contracting out. Section 9 similarly was said to effectively preclude consultation with the unions prior to a lay off or bumping. In all the circumstances, the Supreme Court concluded that these provisions constituted a significant interference with the right to bargain collectively.

146. Having concluded that s. 2(d) of the *Charter* had been violated, the Supreme Court then went on to consider whether the infringements could be saved by section 1 of the *Charter* using the analysis in *R. v. Oakes*, [1986] 1 S.C.R. 103. The Supreme Court in *Health Services* noted that some

of the Legislature's objectives in the case before it, of which the main one involved improving health care, were pressing and substantial and that there was a rational connection between the objectives and the means chosen by the Legislature to achieve them.

147. The Supreme Court however concluded that the requirement of minimal impairment had not been made out. In that regard, it noted that the provisions themselves do not suggest a search for a minimally impairing solution to the government's problem of ensuring sustainability of the health care system over the long term in that the legislation gave employers the absolute power to contract out. The provisions themselves further provide no obligation or incentive to consult with the unions before contracting out work of the bargaining unit to outside contractors. Finally, the Court noted that an examination of the record as to alternatives considered by the government reinforces that conclusion in that the record disclosed no consideration by the government about whether it could reach its goal by less intrusive means and virtually no consultation with unions on the issue.

148. In view of its conclusion that ss. 6(2), 6(4) and 9 failed to meet the minimal impairment test, the Supreme Court found that it was unnecessary to consider the proportionality between the pressing and substantial objectives of the government and the means adopted by the law to achieve them. It held that the offending provisions could not be justified under s. 1 of the *Charter* and were therefore unconstitutional.

(iv) Application of the Principles to the Facts in this Case

149. The first issue to be determined is whether the challenged provisions of the Act violate the procedural right to collective bargaining by substantially interfering with collective bargaining. In addressing this issue, I will first consider whether the provisions interfere with collective bargaining at all or whether they interfere only with unprotected economic interests of the Unions as is suggested by the IESO and the AG and, more generally, whether interference with collective bargaining has been established in this case. If the collective bargaining process itself is found to be affected in this case, I will then consider whether that interference is significant enough to amount to an infringement of the right to freedom of association under s. 2(d) of the Charter.

(a) Do s. 127.2(1), (2) and (3) of the Act Interfere with Collective Bargaining?

1. Interference with Economic Interests or with Charter Rights

150. The IESO and the AG argue that the Unions' complaint is that the challenged provisions interfere with the economic interests of the Unions and their members in securing any future construction work contracted out by the IESO for their members. In this regard, the AG refers to Mr. Bartlett's evidence that the Unions' concern is that their "monopoly of work will be lessened". The IESO similarly suggests that the Unions are seeking constitutional protection for the Unions' own economic interests in maintaining a monopoly of work.

151. There is no doubt that the concern of the Unions in bringing this challenge is about the effect of the challenged provisions on their ability to achieve their members' workplace goals (which goals are not protected) through a process of collective bargaining (which process is protected). That does not however mean that the challenged provisions only affect economic interests or outcomes of collective bargaining and not the procedure itself.

152. In *Health Services*, the Supreme Court stressed the importance of distinguishing between the process and the objects of the process. In rejecting the reasons advanced in the past for excluding collective bargaining rights from s. 2(d) protection, the Supreme Court explained this distinction as follows at paragraph 29:

> 29. The fourth reason advanced for excluding collective bargaining rights from s. 2(d) was the suggestion of L'Heureux-Dubé J. that s. 2(d) was not intended to protect the "objects" or goals of an association (see *PIPSC*, at pp. 391-93). This argument overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the "object" of that association. Recasting collective bargaining as an "object" begs the question of whether or not the activity is worthy of constitutional protection. L'Heureux-Dubé J's underlying concern – that the *Charter* not be used to protect the substantive outcomes of any and all associations – is a valid one. However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:
>
>> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
>>
>> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought*, at p. 8)
>
> In our view, it is entirely reasonable to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. Thus, the characterization of collective bargaining as an association's "object" does not provide a principled reason to deny it constitutional protection.

Given that a trade union's function will always include looking after the economic interests of its members, it will always be possible to suggest that the trade union's interests in maintaining its right to engage in a process of collective bargaining reflects a desire to protect its members' economic interests or workplace goals. Characterizing the interests affected as only economic ones, however, ignores the constitutional protection accorded to the process through which those goals are achieved.

153. I also note parenthetically that the exclusion from collective bargaining of those employed in a managerial or confidential capacity contemplated under s. 1(3)(b) of the Act (to which the IESO referred in argument) is consistent with the definition of collective bargaining adopted in *Health Services*, which definition contemplates that the views of workers will be made known through representatives who are neither nominated or approved by employers.

2. *Impact on Statutory Protections or on the Process of Collective Bargaining*

154. In the present case, the Unions' bargaining rights were obtained by direct hires of the IESO's predecessor, Ontario Hydro, and the Unions negotiated both terms and conditions of their employment on behalf of their members. The Unions advanced their workplace goals through collective bargaining by protecting their employment security in the event of the anticipated change in Ontario Hydro's business model. The Unions' bargaining rights for construction employees of Ontario Hydro were then protected at the time of the break-up of Ontario Hydro by section 69 of the Act, which provision is not in issue in the present case and applies under both the general and construction labour relations regimes. The effect of the challenged provisions is to terminate collective agreements negotiated by the Unions in respect of the IESO and to put an end to the Unions' existing right to engage in future processes of collective bargaining with the IESO.

155. The IESO correctly points out that a similar harsh result might have occurred in the circumstances of this case had the Unions' bargaining rights not been protected by the operation of section 69 of the Act at the time of the reorganization of Ontario Hydro. However, the Legislature did not choose to modify the legislative protections afforded under section 69 of the Act against external threats to collective bargaining rights.

156. Instead, the challenged provisions provide a mechanism for a non-construction employer to apply to the Board for a declaration terminating bargaining rights of a trade union regardless of whether those bargaining rights were obtained by certification, by voluntary recognition, by successor rights, or as a result of the related employer provisions of the Act (*MacIsaac Mining and Tunnelling Co.*, 2000 CanLII 7104 (ON L.R.B.) at para 12). The challenged provisions represent a direct legislative interference with past and future processes of collective bargaining, which is not at all related to how bargaining rights were acquired or contingent on the happening of an external threat to bargaining rights, such as occurs in the case of a sale of business or where the work of the bargaining unit is lawfully contracted out to a contractor.

157. The effect of the challenged provisions is not therefore, in my view, akin to that under ss. 6(3), 6(5) and 6(6) of the HSSDIA considered by the Supreme Court in *Health Services*, as was suggested in argument. As noted, those provisions were found to modify existing statutory protections to collective bargaining available under the Act, and not to interfere with collective bargaining itself. In the case of s. 6(5) and 6(6), the effect of the provisions was to prevent employees from retaining their collective bargaining rights with the contractor in the event that work was contracted out. Given that the B.C. Code, unlike the Ontario Act, would otherwise have protected those bargaining rights in the event work was contracted out, the provisions under s. 6(5) and 6(6) of the HSSDIA were found not to interfere with collective bargaining itself. Rather, they were found to modify legislative protections otherwise accorded to collective bargaining against external threats.

158. A similar type of modification to legislative protections, in my view, is also contemplated under section 69(5) of the Act (referred to by the IESO in argument) under which collective bargaining rights which would otherwise have been protected by the operation of successor rights provisions under s. 69 of the Act are terminated where there has been an intermingling of employees following a sale of business. While section 69 operates to protect collective bargaining rights from being extinguished by a sale of business, section 69(5) represents a modification to those legislative protections against that external event in circumstances where there has been an intermingling of

employees. Section 69(5) provides for the termination of bargaining rights which otherwise would have been preserved pursuant to the legislative protections accorded under section 69 of the Act.

159. Unlike section 69(5) of the Act and ss. 6(5) and 6(6) of the HSSDIA, section 127.2 does not modify existing legislative protections to collective bargaining rights caused by external circumstances, which would otherwise pose a threat to them, such as in the case of a sale of business or a decision by an employer to contract out the work of the bargaining unit. Instead, section 127.2 directly interferes with past processes of collective bargaining by nullifying all collective agreement provisions previously negotiated by the Unions, including *negotiated* contracting out protections. It also directly interferes with future processes of collective bargaining by legislating the termination of the Unions' existing right to engage in such processes on behalf of their members.

3. Interference with the Process on the facts before me

160. In the present case, sections 127.2 (2) and (3) of the Act have the effect of invalidating all provisions of collective agreements negotiated by the Unions in the past on behalf of their members. In addition, the provisions affect future collective bargaining by terminating the Unions' existing right to engage in collective bargaining on behalf of their members with the IESO after the declarations contemplated thereunder are made. The challenged provisions therefore both repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future processes by stripping the Unions of their right to have their representations considered by the IESO in a process of good faith bargaining following the issuance of the declarations mandated thereunder. Given this interference with the process by which the Unions' goals may be achieved, it is not surprising that Mr. Bartlett would express concern about the Labourers' ability to achieve their members' workplace goals for employment security.

161. While the legislation does not prevent future representations from being made, as noted at paragraph 114 of *Health Services*, "the right to collective bargaining cannot be reduced to a mere right to make representations." Without any obligation on the IESO to listen in future to the Unions' representations regarding its members' shared workplace goals and the nullification of all terms of past collective agreements negotiated by the Unions on their behalf, the effect of section 127.2 is to interfere both with past collective bargaining processes and future ones.

162. The interference caused by the challenged provisions to the collective bargaining process is evident from the operation of the provisions themselves and from the evidence of the Unions' representatives who are charged with negotiating with the IESO on behalf of their members. While the AG and the IESO suggest that no such interference can be found in the circumstances before me given that no evidence was led from a single member of either of the Unions indicating that his or her collective bargaining rights have been interfered with, there is simply nothing more that the Unions' members could have added in that respect to the evidence of their chosen representatives.

163. Further, it is not, in my view, necessary to demonstrate that future job opportunities or benefit contributions will be lost by the Unions' members or that a specific Union member will lose work or benefits as a consequence of the declarations contemplated under s.127.2 of the Act. The suggestion that evidence of harm to individual union members, such as economic harm is required is again to confuse the process of collective bargaining with the realization of the Unions' members' workplace goals.

164. The relevant interference is to the *process* of collective bargaining, either to past processes, to future ones, or both. It is through the collective bargaining process that the Unions' members seek to achieve common workplace goals, which the evidence in this case reveals relates first and foremost to securing future work opportunities to the extent possible in bargaining. It is not therefore necessary to demonstrate that the workplace goals will not, or cannot be achieved, through other means (such as by the IESO's voluntary decision to contract out its work to the Unions' members) in order to establish that the challenged provisions interfere with the process of collective bargaining by which the Unions' seek to achieve them.

165. The fact that the IESO does not now employ any of the Unions' members directly, nor has it ever employed them directly since the re-organization of its predecessor, Ontario Hydro, does not further affect my finding that the provisions in issue interfere with the process of collective bargaining in the circumstances before me. It is, in my view, far too narrow a conception of the right to a process of collective bargaining to suggest that what is protected is only the ability of trade union members to negotiate terms and conditions of employment with their direct employer.

166. In this respect, I note that the Supreme Court in *Health Services* adopted the definition of collective bargaining offered by Bora Laskin (set out above), which refers not only to the procedure through which terms and conditions may be settled between an employer and its employees, but also to the "*procedure through which the view of the workers are made known*, expressed through representatives chosen by them…" (emphasis added). The Supreme Court in *Health Services* also had regard to relevant principles in international law concerning collective bargaining, which it noted, at para 77 of that decision, describes the purposes of collective bargaining as "…the regulation of terms and conditions of employment, *in a broad sense, and the relations between the parties*." (emphasis added) At paragraph 89 of *Health Services*, the Supreme Court further summarized the scope of the right to bargain collectively, as follows:

> 89. …the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues *and* terms of employment. (emphasis added)

The constitutional right to collective bargaining as recognized by the Supreme Court of Canada is not therefore restricted to the capacity of direct hire employees to negotiate terms of employment with their direct employer, but also refers more generally to the capacity of workers to act in common to reach shared goals related to workplace issues.

167. In the context of the present case, the Unions are bargaining with the IESO on behalf of their members who are all construction workers and who remain construction workers regardless of the IESO's status as a "non-construction employer" under the terms of the Act. As construction workers, their primary workplace goals are to ensure job security protection through hiring hall provisions, and contracting and subcontracting protections. Unlike other workers in the industrial setting such as the health care workers considered in *Health Services*, their collective bargaining goals have not historically been to ensure job security through direct hire employment by negotiating a prohibition on contracting out. Instead, given the nature of the industry in which they work, the workplace goals of the Unions' members have been and continue to be to ensure job security protections through provisions which permit contracting and subcontracting of work to other contractors on conditions that ensure, to the extent possible, that their members obtain whatever

construction work is performed by the IESO regardless of its decision about how that work will be performed.

168. The more restricted scope to the constitutional right to collective bargaining suggested by the IESO and the AG involving only the right to negotiate terms and conditions of employment with one's direct employer fails to take account of the fact that associational rights are *individual* rights to act in common to reach shared goals. They are neither exclusively the rights of direct hire employees, nor are they rights of the associations themselves to represent their members. They are individual rights to engage in associational activities to reach common goals, which in the collective bargaining context have been recognized broadly to relate to workplace goals and terms of employment. In the present context, it is the right of the Unions' members to engage in collective bargaining through the Unions as their representatives to reach their common goals of ensuring work guarantees in the event of contracting out and to negotiate terms of employment in the event that they are employed by the IESO directly.

169. It is perhaps for the same reason that the Board and the Courts have recognized that an employer and an employee for collective bargaining purposes may be broader than the traditional master servant relationship. As the Board recently noted in *Empire*, an employer for the purposes of a collective agreement will not always employ someone in a bargaining unit. The Board explained as follows, at paragraph 37:

> 37. An employer is, in the dictionary sense, a person or corporation that employs other persons. For purposes of a collective agreement, this may not be literally true at all times. An employer may, from time to time, employ no one within a particular bargaining unit, or within any bargaining unit, without losing its status as an employer. This is often the case in the construction industry, for a small employer in a slow economic time, or a general contractor who subcontracts all of the bargaining unit work on a project to one or more subcontractors. Such circumstances may occur outside the construction industry, but less frequently.

In that case, the Board concluded that, in the construction context, an employer "…may well not employ persons who perform construction industry work, but it must stand in some relationship to the persons performing the work such that it can and does have an impact on the fact of [employment] and the terms and conditions of the employment of those employees" (See *Empire*, at para 40). The Board nonetheless made clear that this broader conception of who is an "employer" for the purposes of a collective agreement is not restricted to the construction industry setting and that the same situation occurs outside of the construction industry.

170. The concept of who is an "employee" for collective bargaining purposes has similarly been recognized by the Courts to include a union member not yet employed in a bargaining unit. For example, in *International Longshoremens Association, Local 273 et al. v. Maritime Employers' Association et al.*, (1978) 89 D.L.R. (3d) 289 ("*International Longshoremens Association*"), a case involving employees working in longshoring, rather than in construction, the Supreme Court rejected the suggestion that there could be no strike because the unions' members who refused to cross a picket line and report for work were not employed in the bargaining unit at the relevant time.

171. In doing so, the Supreme Court had regard to the fact that the collective agreements entered into by the parties were predicated on a relationship under which the union locals undertook

to supply the required labour through a hiring hall system when work was available to be performed. In these circumstances, the Court concluded that the employment relationship for collective bargaining purposes commenced at the time the agreements were concluded. The Supreme Court reasoned as follows commencing at page 294:

> For the purposes of collective bargaining and labour relationships under the resulting collective agreements, members of the Association and members of the Locals were respectively employers and employees from the onset of the agreements, whatever their rights and obligations may or may not include under the common law of master servant. ...
>
> The employees, as the term is used in the collective agreements herein, are of course the members of the local on whose behalf the local has undertaken to supply labour to the employer organization and its component members. It cannot be said that the agreements were designed to operate and in fact operated only after the members of the Locals reported to work. The agreement contemplates a relationship under which both parties have obligations commencing the effective date of the agreement and under which the Association represents all its members and the Locals represent all their members. ... The converse situation arose in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199, 8 O.R. (2d) 103, where the employees sought to take advantage of an employment relationship under a collective agreement. Brooke, J.A., speaking for the Court, stated at p. 208:
>
> > While ss. 37(9) and 42 of the *Labour Relations Act* do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond "employees", I do not regard these sections as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee members of the union and that such rights and benefits may then be subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement. Collective agreements in this industry [the construction industry] have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

Given its recognition that parties to collective bargaining relationships can and frequently do (particularly, albeit not exclusively, in the construction industry where there is often no continuing employment relationship) bargain rights for members of the trade union even if not yet employed by the employer concerned, the Supreme Court adopted a broad view of who is an employer and employee for the purposes of a collective bargaining relationship. In the circumstances before it, in which the parties had negotiated a hiring hall system similar to that in the Unions' collective agreements in the present case, the Supreme Court found that the employer and the trade unions' members are respectively treated as employer and employees from the outset of the collective agreements for the purposes of collective bargaining relationships and labour relationships.

172. The suggestion in the present case that there has been no demonstrated interference with the right to collective bargaining because the IESO does not employ any of the Unions' members directly, in any event, also fails to take account of the fact that the declarations sought by the IESO under section 127.2 are only applicable where such individuals are employed by a non-construction employer or "may be employed". Pursuant to sections 127.2(1), the challenged provisions apply with respect to both "a trade union that represents employees of a non-construction employer employed *or who may be employed in the construction industry*" (emphasis added). The challenged provisions themselves recognize that a non-construction employer, such as the IESO, may not directly employ any construction employees represented by the affected unions at the time the declarations are sought or made. However, by their very terms, the challenged provisions only apply where such employees are employed or "may be employed in the construction industry" in future by the non-construction employer concerned.

173. Even though the IESO contends otherwise, it must be acknowledging that it "may" employ employees represented by the Unions at some point since it maintains that it is entitled to the declarations contemplated under section 127.2 of the Act. The effect of the challenged provisions in the circumstances before me is therefore to nullify the terms and conditions negotiated by the Unions in the past for their members should the IESO, in fact, employ the Unions' members during the applicable term of those collective agreements, as contemplated may occur under section 127.2(1). The effect of the challenged provisions is also to remove the Unions' existing right to negotiate such terms in future collective bargaining processes for such direct hire employees as may be employed by the IESO from time to time. It is not therefore correct to say that the challenged provisions have no effect on the ability of any employee to negotiate terms and conditions of employment with their direct employer.

174. There can also be no doubt that current business plans are subject to change in the same way that the business plans of the IESO's predecessor, Ontario Hydro, changed when Ontario Hydro moved increasingly toward using contractors rather than direct hire construction workers to perform its construction work. While the IESO has not, since its inception at the time of the break-up of Ontario Hydro, employed any of the Unions' members directly and has no current plans to do so, it clearly "may" do so, in which case the Unions' current right to negotiate the terms of such employment through a collective bargaining process will be lost if the requested declarations are made.

175. In any event, the Unions' current right to negotiate the terms and conditions under which the IESO's subcontractors must employ them and to negotiate workplace goals on behalf of their members in a general sense will, of course, also be lost whether or not any members are ever employed directly. In the present case, the evidence indicates that one of the most significant goals of the Unions' members is achieving employment security through the negotiation of contracting and subcontracting protections in their collective agreements with all those employers, including the IESO, with whom they have existing bargaining rights. The scope of the constitutional right to collective bargaining protects the *process* by which the Unions seek to achieve such goals on behalf of their members as well as the *process* by which they negotiate terms and conditions of employment in the event their members are employed.

176. In all the circumstances, I find that the impugned provisions under section 127.2 of the Act do interfere with the process of collective bargaining between the Unions and the IESO.

177. Having determined that the impugned provisions do interfere with the process of collective bargaining in this case, I will now consider whether that interference is substantial such that the provisions may be said to infringe the right to freedom of association under s. 2(d) of the Charter.

(b) Is the Interference Substantial such that It Constitutes a Breach of Freedom of Association?

178. As noted in *Health Services*, in order to amount to a breach of the s. 2(d) freedom of association, the interference with collective bargaining must be so substantial that it compromises the "essential integrity of the process of collective bargaining" (*Health Services*, para. 129). Two inquiries are relevant: first, to what extent do the measures impact on important matters central to the freedom of association of the Unions' members and their ability to achieve common goals by working in concert; and second, to what extent does the process by which the legislative changes were made impact on the process of good faith bargaining and consultation.

1. The Importance of the Provisions

179. The focus on the importance of the collective agreement provisions affected by the legislation relates to the fact that the legislative impact on provisions which are of lesser importance to union members is likely to fall short of discouraging the Unions' members from coming together to pursue common goals in concert whereas interference with more important provisions is more likely to do so. In *Health Services*, the Supreme Court found that legislative provisions which affected collective agreement provisions dealing with contracting out, lay off and bumping were of central importance to the freedom of association, since those provisions affected the capacity to retain employment and/or gain employment security. The Supreme Court also noted at para 92 (cited above) that "unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining."

180. In the present case, once the declarations under the challenged provisions are made, all of the collective agreement provisions negotiated in the past by the Unions on behalf of their members are not simply affected; they are terminated. The provisions at issue include all matters of central importance to the Unions' members, such as those relating to job security protections like the hiring hall, contracting and subcontracting provisions, and also include other provisions of lesser importance as well. The importance of a collective agreement as well as protections such as an "exclusive right-to-work clause" negotiated therein was described as follows by Supreme Court in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C. Ltd.)*, (1995) 125 D.L.R. (4th) 443 commencing at para 72:

> [72] A collective agreement is much more than a private arrangement. It provides the foundation for labour relations. It exists so that peace in labour relations can be achieved and maintained. This goal which is so important for our society is the aim of all labour legislation.
>
> [73] The exclusive right-to-work clause, in turn, provides the basic foundation for the collective agreement itself. It is of such fundamental importance to both parties but, particularly to labour, that I would be surprised if this type of clause is not included in every collective agreement. In fact, the exclusive right to bargaining unit work is so essential to labour relations that it has been described as a proprietary right. It must be

> remembered that clauses which reserve an exclusive right to do certain work to a bargaining unit provide the foundation, not only to a particular collective agreement, but, more importantly, to the entire system of labour relations. Without such a clause, bargaining unit work could be contracted out to those who are not covered by the collective agreement, thereby defeating the entire legislative scheme of collective bargaining.

Given the importance of the collective agreement and the significant job security protections contained within it to the scheme of collective bargaining, the legislative nullification of every single provision negotiated by the Unions during past processes of collective bargaining as is contemplated under s. 127.2, in my view, affects matters of sufficient importance to be likely to discourage the Unions' members from coming together to pursue common goals.

181. In this regard, I reject the suggestion that there can only be substantial interference where the legislation restricts the content of future collective bargaining as well as provisions negotiated in the past. In doing so, I note the Supreme Court's observations at para 92 of *Health Services*, cited above, to the effect that nullification of collective agreement provisions may themselves amount to substantial interference with collective bargaining. In addition, Canada's current international law commitments, which the Supreme Court in *Health Services* indicated provide a persuasive source for interpreting the Charter, also refer to the fact that legislative interventions which have the effect of annulling the content of freely concluded collective agreements are contrary to the principle of voluntary collective bargaining. The relevant principles of international law summarized in B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining (2000), 139 *Intern'l Lab. Rev. 33*, at pp. 51-52) (cited at paragraph 77 of *Health Services*) provide as follows:

> K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.

While it is perhaps arguable that nullification of certain provisions negotiated in the past, even in respect of important matters, will not always be enough to undermine the right to freedom of association, I am satisfied that the impact of section 127.2 does so in this case. The impugned provisions annul every provision in every collective agreement negotiated between the IESO and the Unions on behalf of their members. They thereby significantly undermine the principle of voluntary collective bargaining and discourage continued participation in the process.

182. The legislation in this case, in any event, also goes a step further by ending the Unions' existing right to negotiate on behalf of their members in future processes unless bargaining rights can be re-established through certification or voluntary recognition. In the circumstances, it is difficult to imagine what could be more discouraging to the Unions' members' interest in coming together to pursue common goals than the challenged provisions, which both annihilate all of the gains made by

their chosen representatives in respect of their workplace goals to date and strip the Unions of the right to represent and bargain with the employer in future. The Unions members are thereby required to start all over again at square one by first re-establishing their right to even have their voices heard, and listened to, by the IESO.

183. Given that the present challenge involves a negative (rather than an exceptional positive) rights' claim, the issue before me is whether the legislative interference with the process of collective bargaining, either past, future, or both is substantial such that it discourages the pursuit of common goals. The issue is not whether the Unions' members will continue to have access to an adequate collective bargaining regime after the declarations are made.

184. As such, the fact that the Unions' members may, as the AG and the IESO point out, be in the same position that the agricultural workers in *Dunmore* and *Fraser* wanted to be with access to a collective bargaining regime under the general provisions is not material to the negative rights' claim made before me. There was similarly no suggestion that the health care workers in *Health Services* were deprived of an adequate collective bargaining regime as a result of the challenged provisions. Yet, the Supreme Court nonetheless found that certain provisions substantially interfered with their right to freedom of association, because of their negative effect on past and future processes of collective bargaining.

185. I am not further persuaded that the proportion of work that the IESO has historically had to offer to the Unions' members relative to the amount of work available from other employers bound to collective agreements with the Unions is germane to the issue of whether the legislative interference with the collective bargaining process is substantial. The suggestion by the IESO that the Unions' members will lose only a *de minimis* amount of work if they lose their collective agreements and collective bargaining rights with the IESO based on a historical comparison of the amount of work performed by the Unions' members for the IESO as opposed to the amount of work performed with other employers is not relevant to the nature of the effect on the *process*. In addition, the fact that, under the challenged provisions, no member of the Unions will lose their Union membership does not alter the fact that the provisions substantially interfere with their collective bargaining process with the IESO by dispensing with it altogether.

186. Considering the extent to which the collective bargaining relationship with the IESO may be capable of contributing to the Unions' members' workplace goals of ensuring continued access to a supply of work at decent wages and conditions of employment is again to focus on the Unions' workplace goals, which are not protected, rather than on the effect of the legislation on the collective bargaining process, which is protected. In addition, as the Unions' point out, it is no answer to a Charter violation to suggest that the individuals whose rights have been violated have the ability to mitigate losses caused by the infringement.

187. In all the circumstances, I am satisfied that the legislative provisions affect matters of central importance to the associational right to a process of collective bargaining.

2. *The Process of Interference with Collective Bargaining Rights*

188. The next question is therefore whether the manner in which the associational right is curtailed nonetheless preserves the processes of collective bargaining.

189. In the present case, the measures adopted by the Legislature under s. 127.2 (2) and (3) mandate the termination of bargaining rights and collective agreements following an adjudicative process to determine if the employer in question meets the statutory definition of a "non-construction employer". The Board has no discretion under the legislation but to make the declarations contemplated thereunder once it finds that the employer meets the statutory definition.

190. Adjudication about whether the nature of the IESO's business meets the statutory definition is hardly the same as good faith negotiation or consultation. The provisions themselves render entirely meaningless any discussion the IESO and the Unions may have had about resolving the applications. They eliminate any possibility of meaningful consultation by granting to a non-construction employer so found a declaration ending as of right their collective bargaining obligations with the trade union concerned and their collective agreements. The measure adopted by the Legislature involving the termination of collective agreements and bargaining rights is further something, which the IESO acknowledges, that could never have been obtained through its negotiations with the Unions.

191. In the circumstances, I cannot accept the suggestion that this adjudicative process is somehow better than consultation or that it even preserves a process of good faith bargaining and consultation with the Unions. I also cannot agree with the suggestion of the IESO that the negative effect of the declarations on collective bargaining rights is not the result of legislative action simply because they depend on an application being made to obtain them. As noted, the Board is mandated by the Legislature to make the requested declarations terminating collective agreements and bargaining rights if the employer meets the statutory definition. The measures adopted do not preserve the process of good faith bargaining and consultation with the Unions, since they prevent any meaningful discussion by ending as of right any obligation the IESO may have had to listen to the Unions.

192. In all the circumstances, I am satisfied that section 127.2 (2) and (3) constitute a substantial interference with the right of the Unions and their members to bargain collectively and therefore violate section 2(d) of the Charter.

(c) Are the Violations of s. 2(d) in this case Justified under Section 1 of the Charter?

1. The Test

193. Having established a violation of s. 2(d) of the *Charter*, the question arises as to whether the nullification of negotiated collective agreements and the termination of existing bargaining rights contemplated under the provisions constitute a reasonable limit on the freedom of association of the Unions' members.

194. Section 1 of the Charter provides as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 requires the IESO and the AG, as the parties seeking to uphold the limitation, to establish both that the objective underlying the limitation is sufficient to warrant overriding the constitutionally protected right to freedom of association, and that the means chosen to reach that objective are proportionate (See *R v. Oakes*, [1986] 1 S.C.R. 103 at pp. 136-9). The relevant test for justifying a law which infringes the Charter was succinctly set out in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 as follows, at para 253:

> 253. The state bears the onus of justifying a law which infringes the Charter. The state must comply with three requirements. It must first establish that the limitation of the freedom is prescribed by law. The law must then address pressing and substantial objectives. It must finally be shown to be a proportionate and measured response to this societal need. This third requirement is further subdivided into three components. The law must be rationally connected to the state's objectives. The means chosen must impair the right as little as possible. Finally, the advantages arising out of the law must outbalance its negative effects. (See Oakes, supra; Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at paras. 21 and 97 et seq.; Egan v. Canada, [1995] 2 S.C.R. 513, at para. 182; Sharpe, supra, at para. 78, per MacLachlin C.J.)

In the present case, there can be no doubt that the limitation on the section 2(d) right to freedom of association is a limitation prescribed by law under section 127.2(1), (2) and (3) of the Act. As such, the limitation will be found to be saved by section 1 of the Charter if the AG and the IESO have established that those provisions address a substantial and pressing objective; and, if so, that the three components of the proportionality test have also been met.

195. The AG and the IESO bear the onus of establishing that each of the elements of the *Oakes* test has been satisfied having regard to the context of the law at issue. The infringing measure must be justified and not simply the law as a whole (*R. v. Advance Cutting & Coring Ltd., supra*, at para 255). As noted in *Health Services* at para 139, "[c]ontextual matters to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (S.C.C.), [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827, 2004 SCC 33.

2. *Context of the Limitation within the Overall Scheme of the Act*

196. The fact that the Unions' members may be able to seek recertification under the general provisions of the Act is relevant to an overall assessment of the context of the law at issue when considering whether the law is a reasonable limit on Charter rights. In the present case, the AG and the IESO assert that that possibility is at least theoretically open to the Unions' members under the scheme of the Act should the IESO ever choose to hire at least two construction workers to perform construction work falling within the scope of the existing bargaining unit.

197. The Unions however raise the same concerns as the Carpenters in the earlier constitutional challenge about whether construction workers, performing construction work for a non-construction employer, could in fact be certified under the general provisions of the Act or be certified in a way that is meaningful. They do so in response to the suggestion of the IESO and of the AG that their members still have access to collective bargaining under the general provisions of the Act. In this regard, the AG and the IESO refer to the fact that the Unions could simply seek re-certification of construction employees of the IESO (if and when hired) under the general provisions of the Act after

their existing bargaining rights are terminated by the declarations contemplated under the impugned provisions.

198. In support of the Unions' contention that re-certification under the general provisions would not in fact be possible, they point to the Board's finding in *Ontario Hydro*, [1997] OLRB Rep. January/February 82 ("*Ontario Hydro*") to the effect that only construction unions within the meaning of section 126 of the Act can bring an application for certification in the construction industry and that section 158 of the Act deals with all possible applications for certification in the construction industry. The Unions submit that, because construction employees of the IESO, who in theory could be the subject matter of an application for certification, would be employed in the construction industry as defined under section 1(1) of the Act, only a construction union could make an application for certification for such employees. They however note that the non-construction employer provisions would prevent a construction union from making such an application.

199. The Unions also refer in this connection to the Board's recent affirmation of the principles enunciated in *Ontario Hydro* in *Empire* and to the fact that the Board in *Greater Essex* did not discuss the impact of *Ontario Hydro* on the ability of any union to organize a unit of construction workers employed by a non-construction employer under the general provisions of the Act. The Unions therefore argue that, despite the Board's *obiter* comments in *Greater Essex*, there is no basis on which it can be argued that such a certification application could succeed given the current Board authorities.

200. In *Empire*, the Board concluded that, despite amendments made to the Act in 2000, the Act should still be interpreted as requiring a trade union to meet the definition of trade union under section 126(1) of the Act (i.e. a construction trade union) in order to make an application to represent a unit of employees in the construction industry, a proposition which has generally been accepted since the Board's decision in *Ontario Hydro*. In doing so, the Board reasoned that the proper way to read section 158 in the context of the entire Act is that that section applies to define the bargaining unit in all applications for certification for a bargaining unit of employees employed by a construction employer, who performs work in the construction industry.

201. The panel of the Board in *Empire* rejected the suggestion that the Act should be interpreted as permitting a trade union to be certified under the general provisions of the Act to represent a craft bargaining unit in the construction industry that is similar or identical to bargaining units represented by construction trade unions certified under the construction provisions of the Act. In its view, interpreting the Act in a manner which creates a competing labour relations regime within the same industry would be entirely inappropriate and would undermine labour relations stability, which has been created in the construction industry by the specialized construction provisions of the Act.

202. However, in *Empire*, a decision on which the Unions rely as affirming the principle articulated in *Ontario Hydro*, the Board specifically noted that its analysis may not apply to a union seeking to represent the employees of a non-construction employer whose employees perform construction work. In this regard, the Board in *Empire* made the following observations at paragraph 73:

> 73. It does appear, however, that this analysis may not apply to a union seeking to represent the employees of a non-construction employer whose employees perform construction work. In that case the employer is not an

> employer in the construction industry, and the provisions of section 126 to 166 do not apply to it. In that case, where the employer's business has been excluded from the construction provisions of the Act, it seems likely that any union's organizing activity and right to apply for certification would also be covered only by the general part of the Act. Subject to that exception, the scheme of sections 126 to 168 applies to all other applications for certification in the construction industry.

The Board in that case therefore specifically indicated that its analysis does not appear to apply to a union seeking to represent construction employees of a non-construction employer, to which the construction industry provisions of the Act do not apply. Since construction employees of a non-construction employer would not have access to certification under the construction industry provisions, no concern arises about creating competing labour relations regimes within the same industry for such employees by permitting access to certification under the general provisions of the Act.

203. The Unions further acknowledge that there have been no material amendments to the Act since the Board issued its determination in *Greater Essex* addressing similar arguments raised by the Carpenters in support of their Charter challenge. In all the circumstances, I am not persuaded to revisit the Board's determination in *Greater Essex* as it relates to the issue of access to certification and collective bargaining under the general provisions of the Act. In my view, a trade union may be certified to represent construction employees employed by a non-construction employer under the general provisions of the Act.

204. Nonetheless, given the IESO's current stated intention not to hire construction workers directly and to contract or subcontract out all of its construction work, the prospect of the Unions being able to re-establish those bargaining rights through the general provisions seems unlikely. The fact that the current Board authorities interpreting the Act do not appear to preclude the Unions' members from seeking re-certification under the general provisions of the Act and the fact that an employer is in a position to prevent such certification by choosing to contract out all of its construction work is relevant in assessing the context of the limitation in this case.

205. That certification under the general provisions is at least theoretically possible after the Unions' bargaining rights are terminated by the challenged provisions cannot however itself justify the limitation on a Charter right. As noted, the infringing provisions must themselves be justified by establishing that they address a pressing and substantial objective and by establishing that the three elements of the proportionality test have been met.

206. Other contextual considerations referred to by the parties include the significance of the contracting and subcontracting protections to the Unions' members and construction workers generally. This remains a relevant contextual consideration, since the Unions' members are and continue to be construction workers whether they perform work for a construction employer or for a non-construction employer, such as the IESO. Their collective bargaining concerns arising from the unique nature of employment in that industry remain the same in that they continue to need access to ongoing work opportunities given the transitory nature of work in their industry.

207. The unique nature of labour relations in the construction industry, which led to the creation of a separate statutory labour relations regime for the construction industry, is also relevant. Similarly, the fact that the Legislature has now determined that this specialized regime does not

appropriately address the needs of non-construction employers as defined in the Act should also be considered and accorded deference.

208. The IESO also maintains that it is highly significant that the Unions achieved voluntary recognition with Ontario Hydro without the benefit of any construction industry regime. This contextual consideration may also be appropriate to bear in mind when assessing the Legislature's objectives in enacting the impugned provisions and whether or why it is either necessary or proportionate to terminate bargaining rights in order to achieve those objectives.

3. Is the Objective of the Law Pressing and Substantial?

209. I now turn to the first step of the *Oakes* test, which requires the AG and the IESO to establish that the limitation on the s. 2(d) rights of the Unions and their members was undertaken in pursuit of a pressing and substantial objective of sufficient importance to warrant the limitation on the constitutional right.

210. The AG and the IESO contend that the challenged provisions are a statutory mechanism required to "remove" non-construction employers from the complex construction industry regime under the Act and to "place" them in the general regime, only after a Board adjudicated determination that the employer is a non-construction employer. In the AG's submission, the objective of the legislation is to "ensure that the complex construction industry labour relations regime applies only to those whose needs it was intended to support". The IESO similarly refers to the Legislature's need to modernize Ontario's construction industry labour relations regime and to refine the application of that specialized regime.

211. The AG and the IESO also refer to the legislative objective of permitting the tendering of future construction work by non-construction employers acting as consumers of construction services to members of any union or to any non-union construction industry contractor. According to the IESO, this legislative objective is intended to remedy the situation wherein public sector employers, such as the IESO, are subject to restrictions on their ability to tender publicly funded construction work to workers without regard to their union membership or non-union status. According to the IESO, the challenged provisions are a vehicle by which consumers of construction services, including publicly-funded ones such as the IESO, are able to engage in an open tendering process, which competitive tendering is said to be of benefit to all Ontarians.

212. These policy rationales are said to be evident from the government debates. For example, the AG and the IESO refer to the following comments made by Joe Tascona, the Parliamentary Assistant to the Minister of Education on second reading of Bill 139:

> Currently employers whose primary business is not construction may be bound by the construction industry provisions of the Labour Relations Act, including province-wide bargaining in the ICI sector, the industrial-commercial-institutional sector …
>
> These employers have very little ability to influence negotiations that result in an ICI agreement…
>
> Some construction bargaining rights in the broader public sector were extended due to amalgamation. After the megacity amalgamation, for

> example, school boards in areas like East York became bound to collective agreements that prohibited subcontracting with non-union companies. It's a matter of balance and it's a matter of common sense when you're dealing with this particular issue. Certainly I think what you have to look at is that this company that you're trying to certify under the construction sector labour relations provisions of the act – because there a very specific section under the Labour Relations Act that just deals with the construction industry. So if you have an employer like the Second Cup, whose business is in retail coffee, renovating their operation and they hire a couple of construction workers, are they in the construction industry? I would say not. They obviously needed some construction work to be done on either a new Second Cup or renovating that Second Cup. For them to be bound and now become viewed as construction company makes no sense.
>
> The proposal dealing with prior labour relations decisions makes a lot of common sense to bring some light into what is really the intent of the construction industry, which is to deal with construction companies that are paid for their work because of the construction work they do.
>
> **Exhibit #33 – Book of Documents re Constitutional Facts, Tab 17 at 194, Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, (14 November 2000) at 1930.**

These comments support the suggestion that the non-construction employer provisions were designed to ensure that only those construction companies who are paid for their construction work as opposed to consumers of construction work are covered by the construction industry regime.

213. The IESO also refers to the following comments made by the then Minister of Labour in November 2000 during second reading of Bill 139. It does so in support of its contention that the challenged provisions are also designed to enable consumers of construction services to engage in a competitive tendering process regardless of union membership or non-union status:

> [review of amendments] … The next one we have is the non-construction employer. This one, to me, is really, really about fairness. [Interjection] Well, you said it. Anyway, what we're saying on this particular piece of legislation is this: if you are a municipality or a school board and there's legislation in place today that doesn't allow you to tender construction work to non-union companies, we're taking that off the books. We're not saying you have to tender to non-union companies, we're not telling them they have to tender to union. We're not telling them anything. We're just allowing them to tender the work to whoever they want to tender it to. That seems like another reasonable position to take. There's law on the books that says [interjections] There is another law on the books that says that certain municipalities and school boards can only tender [interjection]. No, not any more. They can only tender their work to unionized companies. Well, 81% of those workers in the private sector don't work for unionized companies. So implicitly, that legislation is discriminatory. It is discriminatory against anyone who doesn't carry a union card, because you can't bid on work.
>
> [emphasis added]
>
> **Exhibit #33 – Book of Documents re Constitutional Facts, Tab 17 at 190, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*,**

L101B (14 November 2000) at 1850 (Hon. Chris Stockwell, Minister of Labour)

These comments suggest that one of the purposes of the non-construction employer amendments was to repeal existing legislation considered to be discriminatory in its requirement that work be tendered only to unionized companies.

214. It should, however, be carefully noted that the legislation itself does not, and did not, require work to be tendered to union companies. Rather, that requirement arises from the collective agreements negotiated by the parties. It is however correct to say that the legislation has the effect of binding employers to such collective agreement obligations in respect of work in the ICI sector. Under the provincial bargaining scheme applicable in the ICI sector, the provincial collective agreement, which generally provides a requirement to contract and subcontract only to union contractors, becomes automatically binding on employers for whose employees a trade union obtains bargaining rights in respect of their work in the ICI sector. The effect of the construction provisions of the Act is therefore to impose those collective agreement requirements negotiated by provincial employer and employee bargaining agencies on employers who are certified in respect of the ICI sector.

215. The construction provisions of the Act do not therefore themselves require that work be tendered to non-union companies as was suggested. Instead, what is alleged to be discriminatory is the contracting and subcontracting provisions contained in most construction industry collective agreements. In addition, as is apparent from the collective agreements negotiated by the IESO directly, not all contracting and subcontracting language negotiated in construction collective agreements requires that only unionized companies perform the work of the bargaining unit. In addition, not all construction collective agreements are negotiated by employer bargaining agencies as opposed to by the employer directly.

216. In determining the purpose of the challenged provisions, absent ambiguity in the meaning of a provision, primary regard must be had to the purpose indicated by the statute as a whole, rather than extrinsic sources (*Delisle*, at para. 17-19). In the present case, the effect of the challenged provisions is to terminate existing collective agreements and collective bargaining obligations binding on a non-construction employer in so far as they relate to the construction industry. That effect is consistent with the asserted purpose of removing the application of the specialized construction industry regime to employers already bound to construction collective agreements and who are found to meet the definition of "non-construction employer" (i.e. who either perform no construction work or perform construction work only on their own account). The effect of the provisions supports a purpose of removing the application of, and collective bargaining obligations governed by, the specialized construction industry regime.

217. The provisions themselves, even when considered in the context of the legislative debates referred to by the AG and the IESO, do not however support an intention to *transfer* or "place" existing collective bargaining obligations into the general regime. Instead, they evince an intention simply to *remove* the application of the construction industry provisions to a non-construction employer and to end existing collective bargaining obligations regulated under that regime. The effect of the challenged provisions therefore goes well beyond the stated concerns about fairness associated with the provincial bargaining scheme in the ICI sector of the construction industry in that they provide a mechanism to terminate existing collective bargaining obligations with construction trade unions altogether.

218. By terminating existing collective agreements and terminating existing collective bargaining rights, the provisions themselves also support the other alleged purpose referred to by the IESO and the AG, which is to permit competitive tendering by non-construction employers who may or may not be publicly funded consumers of construction services. The objective suggested by the legislation when considered in the context of the political debates is to permit the elimination of commitments made to construction trade unions under prior collective agreements whether negotiated by a non-construction employer directly or by a provincial employer bargaining agency with a view to allowing cost savings associated with competitive tendering.

219. Both the objective of removing the application of the construction industry regime to non-construction employers and of permitting competitive tendering by non-construction employers are said to be pressing and substantial objectives which should be accorded deference in light of the competing, social, economic and labour relations considerations at issue.

220. To the extent that the legislative purpose is to allow a certain class of employers, whether publicly funded or not, to operate free of their collective agreement obligations in order to permit cost savings associated with a more competitive tendering process, that objective is suspect as a pressing and substantial one. As noted in *Health Services*, at para 147, to the extent that the object of legislation is to cut costs, it will be regarded with strong scepticism as a basis for justifying a Charter infringement.

221. The other apparent legislative purpose involving changing the line of demarcation between those regulated by the construction industry provisions of the Act and those who are not is one to which considerable deference is appropriately given to the legislative choice about where to draw that line. As noted in *Dunmore* at para 57, "[p]olicy choices are based on value judgements" and are not subject to judicial interference unless "…a more fundamental value is at stake and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances of the case."

222. However, in view of the substantial interference caused by the impugned provisions to the section 2(d) rights of the Unions and their members, the issue before me is not whether the legislative objective reflects a legitimate legislative concern, but rather whether it represents a sufficiently pressing and substantial one to justify a Charter breach. The difficulty in the present case is that there is little or no evidence before me to suggest that the Legislature's underlying concern in enacting the challenged provisions is based on a pressing and substantial concern sufficient to warrant overriding a Charter right in a free and democratic society.

223. There is, for example, no evidence before me of any specific difficulties faced by either the IESO or by non-construction employers more generally as a consequence of the application of the specialized construction industry labour relations regime to them or as a consequence of their existing collective bargaining obligations as they relate to construction workers. The IESO, like other construction and non-construction employers, for their own reasons agreed in collective bargaining with construction trade unions to abide by certain restrictions which might limit a fully competitive tendering process. The evidence before me does not reveal any pressing problem or concern faced by non-construction employers (including banks, large retailers or school boards) which might warrant legislative interference with the freely-negotiated commitments made by them in past collective bargaining or which might warrant relieving non-construction employers of their existing obligations to engage in the process of collective bargaining with construction unions in future.

224. In fact, there is little in the evidence before me to suggest that the Legislature's concern in adjusting the line of demarcation as between the different labour relations regimes for non-construction employers is based on anything other than the perceived unfairness of the application of the construction industry provisions to non-construction employers. More specifically, the view as expressed in the debates is that it is unfair to require non-construction employers to be bound to provincial collective agreements in the ICI sector which those employers had little opportunity to influence and that consumers of construction services should be entitled to tender their work without regard to existing commitments in construction collective agreements.

225. In all the circumstances, even though I agree that the Legislature has the right to change the line of demarcation as it relates to which employers are covered by which legislative regime, I am not satisfied that the evidence before me establishes that the objective underlying the limitation on individual Charter rights is of sufficient importance in a free and democratic society to do so in a manner which overrides the constitutionally protected right to freedom of association.

226. However, even if I am wrong in that regard, I would not, in any event, have found that the AG and the IESO had satisfied all of the necessary elements of the proportionality test necessary to establish that the limitation is saved by s. 1 of the Charter, for the reasons that follow.

4. Proportionality Test

227. As noted, the three elements of the proportionality test are: (1) that the measures adopted must be rationally connected to the objective; (2) the measures adopted should minimally impair the right or freedom in question; and (3) the effects of the measures which are responsible for limiting the Charter right are proportional to the pressing and substantial objective underlying the legislation.

Rational Connection

228. There can be no doubt that the first element of the proportionality test, which requires a rational connection between the challenged provisions and the legislative objective, has been met in this case. As noted in *Health Services*, at para 148, this aspect of the *Oakes* test is not particularly onerous. It involves consideration only of whether the challenged provisions further in a general way the government's important objective (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para 56). In the present case, the challenged provisions may be said to further in a general way the legislative objective of removing certain employers from the application of the construction industry provisions of the Act. As such, the first element of the proportionality test has been met.

Minimal Impairment

229. The next question is whether the means chosen by the Legislature for achieving its objective of removing certain employers from the application of the construction industry provisions of the Act impair the right to freedom of association as little as possible. When assessing whether the measures adopted by the Legislature are proportional to the alleged pressing and substantial objectives, the issue is whether the legislative provisions fall within the range of reasonable alternatives which could be used to meet the pressing and substantial objectives in order to minimally impair the Charter right (*Health Services*, at para 150 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). As noted by the Supreme Court in *R. v. Chaulk*, [1990]

3 S.C.R. 1303 at p. 1343, "[w]ithin this range of means it is virtually impossible to know, let alone be sure which means violate *Charter* rights the least."

230. In the context of the present case, the issue is therefore whether the infringing provisions fall within the range of reasonable alternatives which could be used to remove non-construction employers from the specialized construction labour relations regime in order to minimally impair the s. 2(d) rights of construction unions and their members. The question is not whether the provisions contain limitations in a general sense, but whether they are tailored to impair as little as possible the Charter right.

231. The requirement that an employer prove its status as a non-construction employer as defined by the legislation through a Board adjudicative process means that the deleterious effects of the provisions are restricted to construction trade unions and their members with established construction bargaining rights with employers who are able to meet the definition of "non-construction employer". However, the fact that the legislative provisions contemplate the termination of collective agreements and bargaining rights only after an adjudicative process, which incorporates natural justice obligations and documentary production as alleged, does not establish that they achieve their objective while minimally impacting on the s.2(d) Charter rights of the affected construction unions and their members.

232. In addition, the provision in s. 127.2(4) (referred to by the AG and the IESO), which ensures that the declarations do not affect non-construction industry bargaining rights, limits the deleterious effects to construction trade unions and their members. However, it also does not address how the infringing provisions under s. 127.2(1), (2) and (3) minimally impact on the section 2(d) Charter rights of the affected construction unions and their members.

233. The fact that few employers have applied for, or been granted, the non-construction employer declarations in issue since the provisions were first enacted does not, in my view, necessarily lead to the conclusion that the provisions were tailored to minimally impact on Charter rights. That fact could, for example, also arguably reflect the lack of any pressing and substantial concern for removing non-construction employers with established bargaining rights from the construction industry regime. It could also simply reflect that few employers in Ontario meet the statutory definition. It is similarly equally speculative to suggest, as the IESO did in argument, that the increase in growth of unionization in the period since the non-construction employer provisions, which could have many different causes, reflects the minimal impairment caused by the challenged provisions.

234. If the objective of the provisions is to remove non-construction employers from the specialized construction labour relations regime as suggested by the AG and the IESO (as opposed to the "union busting" objective alleged by the Unions of providing certain employers with a mechanism to eradicate existing, lawfully negotiated collective agreements and bargaining rights with construction unions), a significantly more refined provision was possible. For example, the Legislature could simply have required that the Board declare that the labour relations of those meeting the definition are now governed by the general provisions of the Act and are excluded from the construction provisions (including section 130 thereof and the ICI Province-wide scheme).

235. If the Legislature also had concerns about the content of collective agreements already negotiated under the specialized construction industry regime by employer bargaining agencies,

rather than by the employer concerned directly, a more refined provision was also available. For example, the Legislature could simply have required that construction collective agreements negotiated by an employer bargaining agency, rather than by the employer directly, be renegotiated by the construction trade union and the non-construction employer directly. By doing so, the process of collective bargaining applicable to construction employees of a non-construction employer would have been preserved while meeting the legislative objective of permitting non-construction employers to bargain their collective agreements directly. In order to satisfy this concern, there was no requirement to terminate all existing construction collective bargaining rights and all lawfully negotiated construction collective agreements (whether negotiated directly or not) as of right and thereby ending all processes of consultation with construction unions.

236. While the Legislature was not required to consult with the affected construction trade unions before passing these provisions of general application, the IESO and the AG have presented little evidence to suggest why the options chosen by the Legislature of terminating all construction collective agreements and construction bargaining rights were adopted to meet the objective of transferring labour relations regimes despite other less intrusive options available.

237. That the Act may allow construction trade unions and their members to start over again by re-establishing their collective bargaining rights and negotiating fresh collective agreements under the general provisions of the Act does not explain why the extent of the limitation on s. 2(d) Charter rights was necessary to meet the legislative objective of transferring labour relations regimes. No reasonable explanation has been provided as to why interference with all past processes of collective bargaining, by terminating all construction collective agreements whether negotiated by an accredited or designated employer bargaining agency or not, was necessary. No reasonable explanation has further been provided as to why bargaining rights with construction workers had to be extinguished at all or in all cases.

238. The only rational explanation for casting the net so wide is that the Legislature's objective was not simply to transfer non-construction employers to a different labour relations regime, but was to extricate those employers from the commitments made to construction trade unions and their members in bargaining. According to the legislative debates at the time of the legislation in issue was passed, the goal in doing so was to permit a competitive tendering process free from past commitments made to construction trade unions. By requiring the termination of existing bargaining rights as well, which is also not required to transfer non-construction employers to a different labour relations regime, the apparent legislative objective was to provide non-construction employers with the opportunity not to have to face the same demands in future collective bargaining.

239. It should be recalled that, at the time those legislative measures were adopted and then later amended, and at the time the Legislature amended the Act in 2005, the Charter jurisprudence did not yet recognize constitutional protection to the process of collective bargaining itself. The means chosen by the Legislature to implement its objectives did not consequently run afoul of the s. 2(d) Charter rights of trade unions and their members as that right had been applied and interpreted at the time the non-construction employer provisions were enacted and then amended. However, given the expanded understanding of the s. 2(d) Charter right adopted by Supreme Court of Canada in 2007 in *Health Services*, such interference with past and future collective bargaining processes can no longer be tolerated absent a pressing and substantial concern sufficient to warrant overriding a Charter right in a free and democratic society.

240. As noted above, a concern premised on cutting costs by allowing competitive tendering is suspect as a pressing and substantial concern sufficient to warrant overriding a Charter right. The evidence before me does not indicate that that objective is sufficiently important to do so. To the extent that the legislative objective of transferring non-construction employers to a different labour relations regime may be found to be of sufficient importance to override a Charter right, the measures adopted to achieve that objective cannot be said to impair minimally the s. 2(d) Charter rights of the Unions and their members. The legislation does not simply remove them from the construction industry regime, it eliminates all of the fruits of their past collective bargaining processes and ends the existing requirement of the IESO to listen to them in future bargaining processes.

241. In all the circumstances, I am not persuaded that the minimal impairment branch of the proportionality test has been met in the circumstances of this case.

Proportionality between Effect and Objective

242. I also would not have found that the last component of the proportionality test, involving weighing the deleterious effects of the measures which are responsible for limiting the rights and the salutary effects of the measures, had been met. In *Dagenais v. CBC*, [1994] 3 S.C.R. 835, the Court characterized this part of the *Oakes* test as follows at page 889:

> … there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and salutary effects of the measures.

243. In the present case, the AG identifies the salutary effects of the challenged provisions simply as reflecting the need to remove non-construction employers from a regime designed for construction employers. The salutary effect of doing so is not clearly articulated nor is it, as noted above, immediately apparent. According to the legislative debates, the salutary effects of doing so involve ensuring that non-construction employers are in a position to bargain their own deals directly with construction trade unions (rather than through designated or accredited employer bargaining agencies) so that their own specific bargaining concerns may be met.

244. The other alleged salutary effect of the measures adopted by the Legislature involves relieving non-construction employers of the commitments made to construction trade unions in order to permit, among other things, a competitive tendering process. According to the IESO, doing so allows fair access to work opportunities and eliminates the IESO's obligation to impose terms and conditions of employment on non-union contractors who perform construction services for it by way of the "labour requirements clauses" contemplated under their collective agreements with the Unions.

245. The IESO also referred in argument to the fact that the provisions remedy the situation where construction industry bargaining rights may be held in perpetuity. According to the IESO, but for the provisions in issue, consumers of construction services may be forever bound to construction industry bargaining rights which are insulated from any democratic rigour or practical utility whatsoever. The IESO argues that the Act otherwise provides no provision for the termination of unnecessary and inert construction industry bargaining rights. The IESO therefore suggests that the provisions have a salutary effect on workplace democracy by requiring that bargaining rights be re-established through certification and thereby enhancing the dignity of workers.

246. In the context of legislation which is said to be designed to transfer non-construction employers to a more suitable collective bargaining regime, the suggestion here is that the specialized construction industry collective bargaining regime presents insurmountable hurdles to terminating the construction bargaining rights of non-construction employers. Alternatively, the suggestion is that consumers of construction services operate in a manner different from construction employers (who are paid for their construction services), and in a manner which insulates construction industry bargaining rights from ever being terminated through a democratic process.

247. These suggestions are misleading in that the usual mechanism for employees to terminate bargaining rights under the specialized construction industry regime and the general provisions is substantially the same. In both cases, an application must generally be made by direct hire employees in the bargaining unit during specified periods, such as during the open period of the applicable collective agreement. While the application must be brought by an employee, under both regimes, the employer, not the trade union, is the one who is in control of whether union members will have the opportunity to do so. The employer is the one who decides whether any union members will be directly employed during the relevant open period.

248. A consumer of construction services, such as the IESO, is in no different position in that regard than a construction employer who is paid for the construction services it provides. Given the transitory and specialized nature of construction work, both types of employers can and frequently do choose to have their work performed by contractors rather than by direct hires. Mr. Bartlett, for example, referred in evidence to the fact some large general contractors operating in the construction industry, such as Ellis Don and Cadillac Fairview, perform the majority of their construction services using contractors rather than direct hires. There is nothing to prevent either a consumer of construction services or a general contractor from choosing to employ a construction worker directly. Consumers of construction services, including individual homeowners, are in no less a position to do so than those paid for their construction services by third parties.

249. The suggestion that bargaining rights may exist in perpetuity absent the challenged provisions therefore has nothing to do with either one's status as a non-construction employer or any differences in the manner in which bargaining rights may be terminated under the construction industry labour relations regime as opposed to under the general labour relations regime. What the challenged provisions do not do is free the IESO from the constraints imposed specifically by the construction provisions of the Act as it relates to the termination of bargaining rights. Rather, they provide the IESO with a mechanism to apply directly to terminate those bargaining rights irrespective of the wishes of the Unions' members for whom the Unions hold bargaining rights in respect of construction work performed by the IESO. While this is no doubt a perceived benefit to the employers affected by the measures adopted, such as the IESO, that are relieved of the commitments they made in bargaining, the ability of a certain class of employer to operate non-union irrespective of the wishes of the workers for whom the construction trade unions hold bargaining rights is not properly viewed as a salutary effect of the legislative measures.

250. The provisions cannot further properly be said to enhance workplace democracy or the dignity of the workers, who will lose all benefits of prior collective action and their collective voice with the IESO regardless of their wishes in that regard. In all the circumstances, the suggested salutary effect of the legislation involving freeing up the IESO's organization resources otherwise required to engage in a process of collective bargaining with the Unions cannot be seen to outweigh its deleterious effect on the right of Union members to a collective voice in the IESO's workplace.

251. The fact that the Unions' members may, at least in theory, be able to regain bargaining rights under the general provisions, albeit relevant to the overall context, is also not itself properly characterized as a salutary effect of the legislative measures adopted under s. 127.2. At best, that fact represents an opportunity for the Unions' members to be able to mitigate the negative effects of the legislative measures adopted which extinguishes existing bargaining commitments and bargaining rights. In addition, the alleged opportunity to start over by re-application under the general provisions is also, to a large extent illusory, given that the IESO is in a position to (and plans to) prevent the Unions' members from having the opportunity to mitigate the negative effects of the legislation by choosing not to employ any construction workers directly, who could bring a certification application under the general provisions of the Act.

252. The alleged salutary effects of enabling a competitive tendering process and freeing the IESO from the obligations to which it agreed in bargaining of requiring non-union contractors to sign labour requirements clauses are in large measure what the Unions, in fact, refer to as the deleterious effects of the legislation. That is, the Unions refer to the nullification of their collective agreements, permitting employers not to abide by the commitments made in bargaining and the destruction of the collective bargaining process itself as the deleterious effects of the legislation. In particular, they point to the elimination of the work guarantee commitments made to them in bargaining and also refer to the eradication of their bargaining rights at the behest of the employer as a negative effect of the legislative measures adopted.

253. In the present case, there is no evidence of any pressing problems caused by the commitments made to trade unions during the collective bargaining process beyond the views of some regarding the fairness to non-members associated with those freely-negotiated commitments made through the collective bargaining process itself. Yet, the infringing provisions in the present case not only nullify the freely-negotiated contracting out provisions, they also void all commitments made in bargaining in the past. They also dispense with collective bargaining altogether by terminating the IESO's existing obligations to engage in future collective bargaining processes with the Unions.

254. The legislative measures in the present case therefore go beyond those which were found to fail the proportionality test in *Health Services* (despite the pressing and substantial concern of the legislation in that case which was aimed at improving health care delivery in the face of a provincial health care crisis). In that case, the union members affected by the legislation lost the contracting out protections which they had negotiated and were restricted in their negotiations on that issue, but they still otherwise maintained their existing collective agreements and their existing bargaining rights. In addition, those members who lost their employment as a consequence of the loss of contracting out protections were also able to seek certification and bargain with their new employer. The loss of those protections and interference with future collective bargaining was nonetheless found to violate their section 2(d) rights.

255. In the present case, the provisions negatively affect current and future members of the Unions who are eligible to enjoy the benefits of the collective agreements negotiated by their collective bargaining agent, including the protections negotiated in respect of future work opportunities. Given the absence of evidence about any significant problems caused to the IESO, (or non-construction employers more generally) associated with the commitments made to construction trade unions in bargaining, I am unable to find that the alleged salutary effects of the legislation relieving non-construction employers from those obligations are significant.

256. Having regard to the evidence before me, I am further unable to find that the alleged salutary effects of the measures adopted outweigh their deleterious effect, which include a total undermining of all past processes of collective bargaining and the destruction of existing obligations to engage in those processes in future irrespective of the wishes of the Unions' members.

257. In all the circumstances, I am not persuaded that the AG and the IESO have met their burden of establishing that the legislative measures adopted meet the proportionality test.

VII. CONCLUSION

258. By virtue of the Supreme Court of Canada's decision in *Health Services* in 2007, the s. 2(d) right to freedom of association is now recognized to extend constitutional protection to the process of collective bargaining itself. The legal landscape has therefore fundamentally changed since the challenged provisions under section 127.2 of the Act were first enacted and later amended and even since the Legislature amended the Act in 2005. The legal landscape has also significantly changed since the Board last considered the constitutionality of the non-construction employer provisions four years ago in *Greater Essex*, albeit in respect of an entirely different type of claim.

259. In view of this fundamental change to the constitutional jurisprudence which now extends protection to the collective bargaining process and for all the foregoing reasons, I find that the legislative measures adopted under s. 127.2 (2) and (3), which require the Board to declare that existing collective agreements and collective bargaining rights are terminated upon the application of a "non-construction employer", infringe the constitutional right to freedom of association under s. 2(d) of the Charter of the Unions and their members as that right has now been applied and interpreted by the Courts. The challenged provisions go well beyond providing a mechanism for movement from one labour relations regime to another. They end the process of collective bargaining between the Unions and the IESO altogether and destroy the product of the exercise of the right of the Unions' members to engage in that process, being their freely negotiated collective agreements with the IESO.

260. I therefore conclude that issuing the declarations required by s. 127.2 of the Act in the circumstances before me has the effect of substantially impairing the capacity of the Unions' members to exercise their right to engage in a process of good faith collective bargaining contrary to s. 2(d) of the Charter. I also find that it has not been established on the facts before me that the constitutional violation is a reasonable limit in a free and democratic society and as such saved by s. 1 of the Charter. In the circumstances, I find that the challenged provisions are constitutionally inoperative in this case. I therefore decline to issue the declarations contemplated thereunder.

0222-09-R; 0770-09-R Laurentian University Staff Union, Applicant v. **Laurentian University**, Responding Party v. United Steelworkers, Intervenor

Bargaining Unit – Certification – Conflict of Interest – The union sought to certify full- and part-time security officers in two bargaining units – The University challenged the propriety of having the union represent the guards when it already represented a unit of staff (non-faculty) employees – The Board examined the duties of the security officers and found that the majority of their time is spent staffing parking booths, opening locked doors, dealing with

student issues, or monitoring video surveillance cameras that are not generally trained on employees at work; very little time is devoted to dealing with staff in the other bargaining unit – The Board's jurisprudence suggests that s. 14 of the Act has been applied to security officers who monitor other employees or protect an employer's property – While the guards at issue do protect university property, the Board found they do not do so in relation to the activities of other staff, so there would be no conflict of interest in having the applicant represent the guards

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Tracey Henry, Tracy Ooost, Jacques Bourgeois* and *Dave Lapierre* for the applicant; *Jack Braithwaite, Larry Denomme* and *Branko Rayakovich* for the responding party; *Cathy Braker* and *Lesley Gilchrist* for the intervenor.

DECISION OF THE BOARD: November 6, 2009

1. These are two applications for certification. The subject employees are in two bargaining units, one of full-time security officers and one of part-time security officers. The parties agree that the Board can determine the two applications together. The full time security officers are currently represented by the intervenor.

2. Representation votes were held and a majority of employees in each bargaining unit voted in favour of representation by the applicant. However, the University objects to the certification of the applicant under section 14 of the *Labour Relations Act, 1995* (the "Act") because, it asserts, certifying the applicant to represent the security officers would create a conflict of interest. This is because the applicant already represents another bargaining unit at the university, that being a unit of staff (non faculty) employees.

3. The Board held a hearing over three days to review the evidence and arguments of the parties regarding the employer's objection under s. 14 of the Act. The employer called one witness, its Director of Security and Parking, Larry Denomme, and the applicant called one witness, Dave Lapierre, the President of the intervenor United Steelworkers local which currently represents the security officers. The intervenor did not call a witness or take a position in the hearing. Both witnesses were truthful and forthright. There is really no significant dispute on the facts.

4. The security officers in question are the campus security for Laurentian University. Laurentian University has a large campus in Sudbury sitting on 800 acres, 750 of which is bush. There are 27 university buildings. Approximately 10,000 full and part-time students attend the University, 1500 of whom reside on campus. There are approximately 400 faculty. 228 full-time staff are represented by the applicant and there are also a number of part-time employees at the University. The University campus therefore is equivalent to a good sized town during the day during the school year. There is still a relatively large sized student, staff and visitor population at night and in the summer.

5. There are security officers on duty twenty-four hours a day, seven days a week. They work 12-hour shifts. On the day shift there are four security officers. Two of the day shift officers are engaged in parking-related activities, one writing parking tickets and one occupying a parking kiosk. The other two officers are on patrol and respond to calls. On the night shift there are two security officers who primarily respond to calls and patrol.

6. The duties of security officers are set out in a job posting which was put into evidence and which, based on the evidence I heard, reflects the actual responsibilities of security officers:

> **RESPONSIBILITIES**
>
> Reporting to the Director of Security, the incumbent will:
> 1) provide safety and security to all staff, students and visitors on Laurentian University's campus;
> 2) enforce laws and regulations on campus;
> 3) direct traffic and enforce traffic regulations;
> 4) investigate complaints, offenses and traffic accidents;
> 5) conduct security and fire patrols of campus buildings and grounds;
> 6) perform traffic and crowd control at special events;
> 7) supply information to the general public of a regulatory and directional nature;
> 8) provide first-response emergency assistance;
> 9) provide money escorts, collection, maintenance of machines and delivery to the Treasury Department;
> 10) maintain parking equipment;
> 11) provide monthly inspections of emergency phones, parking lots and elevators;
> 12) submit reports concerning assigned activities;
> 13) perform other duties as assigned.

7. In addition, the security officers are fairly regularly called out to deal with wild animals, like bears, which have wandered onto the property.

8. There was a substantial amount of evidence led about the duties actually performed by security officers. In addition to the testimony from Mr. Denomme, a number of incident and investigation reports regarding various incidents reported by security officers and a log book which briefly describes the day-to-day activities of security officers, were put into evidence.

9. Mr. Denomme gave evidence about how security officers investigate incidents at the University. Generally, the security officer's participation is instigated by someone calling the security office which then dispatches one or two of the patrol officers to the person who made the call. Only rarely is the security officer actually present when the incident occurs. The security officer attends to the person who made the call and investigates the incident. The security officer takes witness statements, photographs or collects physical evidence and creates an incident report which describes the results of the security officer's findings. Prior to making the report the security officer(s) may go to the security office and look at the record captured by security cameras to see if there is anything recorded by the cameras to assist in the investigation. The officer may also review door access card swipe records.

10. There are occasions in which a security officer will call the police and the police will conduct the investigation. This occurs when the incident is a serious one, usually with criminal law implications.

11. Routine matters are described in security officers' log books. I have carefully reviewed the log books. (I note there was an issue about whether the log books reviewed in the hearing were representative – I am satisfied they are). Non-parking security officers appear to spend the majority

of their time responding to incidents and unlocking/opening doors. It is apparent that the vast majority of what security officers do on a day-to-day basis outside of parking control includes:

i) answering requests from staff and students to open locked doors;

ii) dealing with students in a variety of ways – drunkenness, disorderly, loud, injured, etc.

12. Outside of staff who work on parking/security related activities in the parking office and staff in the security office, security officer contact of any kind with the employees represented by the applicant appears rare.

13. With good reason, there was considerable time spent in evidence regarding instances where the security department had investigated staff employees who are represented by the applicant. Two comments are in order. First, this occurs very rarely; there was only evidence of two or three instances. Second, in each instance the investigation had been virtually exclusively made by Mr. Denomme alone or with another member of management. In one instance Mr. Denomme conducted several witness interviews. With respect to one interview he brought along a security officer; however that security officer did not ask the witness any questions or participate in a meaningful way.

14. Mr. Denomme or any security officer has never been called to testify in an arbitration hearing, but it could happen. Similarly, security officers could in theory be asked to escort employees to their cars after they have been discharged. However, this has also never occurred.

15. A significant responsibility of security officers is opening locked doors for employees, students and contractors. There was little evidence that security officers do anything other than unlock/lock the doors. That is, there is no evidence that they remain around while the individuals conducts their business in the unlocked room or that they, in all cases, even know why the door is being unlocked.

16. In addition to and to assist with these duties described above the security officers also have access to a video surveillance system. There are numerous cameras located throughout the university both indoors and outdoors. Almost all of the cameras are focused on locations which are not spaces where employees represented by the applicant work. There are two or three possible exceptions. One camera is focused on a math computer lab. It was placed there because the University was experiencing the theft of computers. University employees including staff represented by the applicant may be present in the lab and working. A second exception is in a camera located in the animal lab. The camera was put there to dissuade militant animal rights activists, but may very occasionally show staff at work.

17. Cameras may be manipulated by a security officer; they can zoom and pause and be directed to a specific location. However, except on those rare occasions when disability accommodation may be required, there is no full-time viewing of the cameras by security officers. Instead officers may spend occasional periods viewing the cameras rather than patrolling, particularly at night. In addition, if there is an incident on campus officers may examine the recordings made by the cameras in an attempt to ascertain what occurred.

18. Another tool available to security officers is access (swipe) card reports. These reports enable the officer to determine which card was used to open a door which requires a card be swiped for access. These reports may be correlated with video surveillance recordings. The access cards themselves are not issued by the security department and in fact may be issued by a member of the applicant located in the physical plant department. Those physical plant employees, who are sometimes members of the applicant, also determine who gets a card and codes the cards.

19. In addition to the day-to-day duties, the University also relies on the fact that security officers may have obligations during a strike by staff which could place them in a conflict of interest. Security officers would likely have to watch picket lines for signs of improper conduct by picketers. They may also have to videotape picketers, prepare incident reports or swear affidavits for use in injunction applications, although these things have never occurred at the University. On the other hand, the members of the staff bargaining unit have only been on strike one time in the many years they have been represented by the applicant. That strike lasted only a few hours.

20. The employer also relies on the provisions of the applicants' constitution. Specifically Article XX: *Disciplinary Action* states:

> Disciplinary action [which may take the form of a reprimand, fire, removal from office and/or expulsion from LUSU] may be taken against a LUSU member for the following reasons:
>
> i) crossing a legal picket line established by LUSU.

Decision

21. Section 14 of the Act states:

> **14.** (1) This section applies with respect to guards who monitor other employees or who protect the property of an employer.
>
> (2) Unless the employer notifies the Board that it objects, a trade union that admits to membership persons who are not guards or that is chartered by or affiliated with an organization that does so may be certified as the bargaining agent for a bargaining unit composed solely of guards.
>
> (3) Unless the employer notifies the Board that it objects, a bargaining unit may include guards and persons who are not guards.
>
> (4) If the employer objects, the trade union must satisfy the Board that no conflict of interest would result from the trade union becoming the bargaining agent or from including persons other than guards in the bargaining unit.
>
> (5) The Board shall consider the following factors in determining whether a conflict of interest would result:
>
> 1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.

> 2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
>
> 3. Such other factors as the Board considers relevant.
>
> (6) If the Board is satisfied that no conflict of interest would result, the Board may certify the trade union to represent the bargaining unit.

22. I agree with the employer that the Board must examine all duties together to see if, in total, they amount to a conflict of interest under the Act.

23. The Act has contained special provisions for security guards for many years. However, these provisions have changed over time. The leading case with respect to the most recent rendition of the security guard provision of the Act is *Old Oak Properties Inc.* [1996] OLRB Rep. July/August 648. In that case the Board discussed the meaning of s. 14 of the Act (which was brought in by Bill 7) and placed it in historical context. I quote from it extensively:

> 101. In defining the term "guard", section 14 borrows from both of its predecessor provisions. Instead of modifying the term "guards" as old section 12 did ("a guard to protect the property of an employer") or as Bill 40's section 6(6) did ("guards who monitor other employees"), it combines the two approaches. Subsection 14(1), which sets the context within which the new rules apply, provides that the new section applies to "guards who monitor other employees OR who monitor the property of an employer".
>
> 102. To put the new provisions in statutory context, I should note that the new Act continues some of the long-standing provisions regarding appropriate bargaining units. The sections regarding units of craft members, engineers and dependent contractors are now found in subsections 9(3)-(5) of the new Act and the format of 'deemed appropriate bargaining units' remains. Guards, in contrast, are now removed from that context. The statutory location of the new provisions is more similar to that of old section 12 of the pre-Bill 40 Act. Like old section 12, new section 14 is a free-standing provision placed in that part of the Act that deals with certification. And like old section 12 it deals not only with permissible bargaining unit structure but also with restrictions on the right of certain trade unions to be certified to represent guards.
>
> 103. Yet it is not a return to the formula of old section 12. Old section 12 was a strict prohibition. Section 14 prohibits nothing. It is *permissive* in its provision that certain configurations of guards bargaining units and bargaining agents "*may*" exist. A union "*may*" be certified to represent guards even if the union is not a guards-only union. Guards "*may*" be included in units with other employees. Although the new provisions are permissive, the severe strictures apply as soon as an employer registers an objection. If the proposed bargaining agent or bargaining unit is to survive, the union must satisfy the Board that *no* conflict of interest would result from its proposal. If a conflict of interest would result, the trade union that represents persons who are not guards simply cannot represent the guards whom it proposes to represent.

104. The 'permissive' as opposed to 'mandatory' structure also distinguishes the new law from the Bill 40 provision. Subsection 6(6) of the old Act *mandated* a guards-only bargaining unit in certain circumstances, i.e., where (a) the employer or union so requested, and (b) the inclusion of guards with employees whom they monitored would give rise to a "conflict of interest".

105. The manner in which the new law uses the phrase "conflict of interest" also distinguishes it from its predecessor provisions. The crux of section 14 is a code of guidelines that the Board must consider when assessing whether a "conflict of interest" exists.

106. Under Bill 40, the Board assessed whether "the monitoring of employees would give rise to a conflict of interest". Without statutory definition or restriction on the meaning of those phrases, the Board resorted to its earlier case law and noted its view that the Legislature had in essence codified that case law. The focus was the monitorial authority of the guards, just as it had been under the Board's interpretation of old section 12. Under the new Act, the focus shifts slightly. Now, the monitorial authority of the guards is just one of a number of factors that the Board must assess in judging whether a conflict of interest exists.

107. By mandating that the Board consider certain factors in determining whether a conflict of interest would result, the Act suggests that there are a variety of things other than guards' monitorial authority that might affect the determination. The list of factors in subsection 14(5) encompasses: (i) guards' duties monitoring other employees; (ii) guards' duties protecting their employer's property, (iii) other duties and responsibilities; (iv) other factors the Board considers relevant. The last item on the list indicates the generality of the inquiry, i.e., that assessment of conflict of interest is no longer rooted merely in consideration of "the monitoring of other employees".

108. In practical terms, this means that the determination of the existence of a conflict of interest may now rest upon something other than a simple finding such as the guards' authority to search the belongings of other employees. No such simple line is drawn in the statutory guidelines for determination of whether conflict of interest would result. Indeed, it is at least conceivable that the Board might find that other factors outweigh the effect of monitorial authority.

109. Even on that one factor, i.e., the guard's monitorial authority, the new Act has significantly altered the assessment. In case law under old section 12 and under the language of Bill 40's section 6(6), the Board simply looked for the existence of "monitorial" authority. Bill 7's language requires the Board to assess "the *extent* of the guard's duties monitoring other employees of their employer". It suggests a gradation in monitorial duties, and that some degree of monitorial duties may give rise to a conflict of interest while some may not. Counsel for the Labourers argued that "monitoring" duties must include, at a minimum, a role in admonishment or warning of those monitored. While this may reflect one of the 'degrees' of monitorial authority contemplated by paragraph 14(5)1, I am not convinced that it is the only sort contemplated in the new scheme. Without doubt, a role in admonishing those whom one guards amounts to a greater degree of monitorial authority.

> 110. The notion of a scale of degrees of monitorial responsibility is not new. It reflects the reality of a wide range of guarded properties, from low security to high security. For example, in *Windsor Casino Limited*, [1995] OLRB Rep. Feb. 206, the Board distinguished between the duties of security guards and surveillance officers in a casino. While security guards had a merely incidental duty to monitor surveillance officers (e.g., while entering or exiting the building), a fundamental duty of the surveillance officers was to monitor other employees (including security guards). Although there had been no dispute between the parties in that case regarding the separation of the security staff unit from the unit of other casino employees, the employer sought a separate unit for surveillance staff. The Board highlighted the "unique responsibility" of surveillance officers to their employer. Since the monitoring of security guards was an essential part of the security officers' work, a conflict of interest was inevitable.
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> 111. In determining whether a "conflict of interest would result" in the new statutory context, the Board's original analysis in *Geo. A. Crain & Sons Ltd.* remains helpful. Unacceptable conflict arises where there is a "real and serious" conflict of loyalties. Though the new provisions point to a broader range of factors to be considered and to differing results across the spectrum of guarding authority, the Board ultimately must still decide whether it sees "conflict of interest". And the determination of "conflict of interest" remains rooted in the unique labour relations context of an Act which governs the often competing interests of employers and unions. Where an employer contends that a "conflict of interest" would result from the representation of its guard employees by a trade union that admits to membership persons who are not guards, the essential question is this: does the guards' relationship to such a union undermine the employer's' reliance on the guards?

24. The Board went on to discuss the Act's requirement of an assessment of the extent that security officers have the duty of protection of property and applied it to the facts of that case in passages which are relevant to the facts here:

> 121. In reviewing paragraph 14(5)2, Old Oak took the position that guards' duties monitoring a contractor's employees were the sort of duties contemplated in the reference to "other duties or responsibilities of the guards that might give rise to a conflict of interest". In my view, those duties may also be of the sort contemplated by the reference in paragraph 14(5)1 to "duties ... protecting their employer's property". The phrase recalls the old (preBill 40) section 12 reference to "guards who protect the property of an employer".
>
> 122. As under old section 12, the Board's task is "to decide what is the meaning of that term as it occurs in the context of this statute". (See the comments made by the Divisional Court in considering the Board's extrapolation of a 'conflict of interest' test from old section 12: *Wells Fargo Armcar, supra.*) Under old section 12, the Board interpreted "guard [who] protect[s] the property of an employer" to mean reference to guards who had duties monitoring other employees. In determining what the Act means by duties "protecting their employer's property" in paragraph 14(5)1 of the current Act, the Board must again look to the statutory context. Here, the phrase arises within the requirement to determine whether "conflict of interest would result" from guards' representation by a union that admitted

employees other than guards. "Conflict of interest" in this context refers to the conflict between guards' special duties to their employer and their expected loyalty to fellow union members. A guard's relationship to the employer's property, in itself, is not critical. In the statutory context, what matters is the guard's duty to protect that property from intrusion by persons who may include fellow union members. *Thus, paragraph 14(5)1 would appear to be broad enough to encompass guards' duties protecting their employer's property from fellow union members, including those working for other contractors on the employer's site.*

123. Whether the Board considers the relationship of Old Oak guards and Martin's cleaners under one statutory provision or the other, the parties agreed that that relationship was the central issue in the case.

124. As Old Oak acknowledged, the main duty of its guards is to observe. During day shifts, guards are not expected to control or limit general access to the downtown buildings which, after all, are commercial areas open to the public. Although the day shift guards watch for anything out of the ordinary, the 2 guards can hardly be expected to ensure against unwanted access or damage to a property as large as the downtown complex. While guards must watch for vandalism, theft, property damage, equipment failure, and fire, it can hardly be said that they are expected to prevent all of these things. The single patrol guard could not possibly manage such a task across the large area that he patrols. As for the desk guard, much of his duties consist of providing service to tenants and visitors to the buildings. Although there are surveillance cameras, enunciator panels and intercom systems to monitor, guards spend much of their time assisting visitors to the building, answering tenant inquiries, dealing with tenant parking and access cards, directing delivery persons and contractors and the like.

125. The guards' role in property protection is somewhat more intensive during the afternoon and night shifts. However, this has more to do with the fact that the commercial buildings are closed for business and thus much quieter, allowing desk guards greater opportunity to monitor the surveillance camera screens and other systems monitors and allowing patrol guards to check premises that are locked rather than wide open to the public. Although there are three guards on the afternoon shift, this does not allow for (and the employer does not appear to expect) a guard force that can prevent vandalism, theft and the rest. Guards succeed in that role to some extent because of the deterrent role served by a constant patrol; but they cannot be expected to be simultaneously aware of all happenings at all locations in the large complex. They observe what they can and investigate what is reported to them; their manager's main expectation is that guards 'log' what they have observed and anything that has been reported to them. In reviewing the parties' detailed references to the guards' duties and to their log book, I note no change in performance of guards' duties or in the sorts of occurrences that they have addressed before and after their strike. This includes reports of any damage or security violations by Martin's cleaners.

126. Given the nature of Old Oak's premises, it is not surprising that the guards' role is not as intensive as the role of guards at other sorts of workplaces. In the spectrum of "extent of duties" in property protection, the duties of Old Oak guards are far less intensive than those of guards in

factories producing banknotes, or of guards employed in casinos (see *B.A. Banknote a Division of Quebecor Printing Inc.*, [1994] OLRB Rep. Nov. 1484, and *Windsor Casino, supra.*) As Old Oak's building manager succinctly described the downtown office complex, "it isn't a penal institution". In other workplaces employers have greater reason to fear problems such as vandalism or theft. Arguably, employers have greater reason to be vigilant for conflict of interest in such circumstances.

127. Old Oak's main contention was that the guards' duties in monitoring cleaners who were fellow union members would give rise to a conflict of interest. While recognizing that part of the relationship between cleaners and guards is 'teamwork' (in that one group advises the other of problems within the other's scope of responsibility), Old Oak sought to distinguish the relationship that guards have with their employer from that which the cleaners have either with Martin's or Old Oak. Old Oak contended that guards are a higher level of employee, amounting to "managerial assistants" with a greater responsibility to their employer. Without doubt, the general nature of a guard's role (whatever the extent of his or her duties) demands a special loyalty to the employer's interests. But as a matter of general principle I am not certain that all types of guards owe a loyalty or duty necessarily more onerous than that of all cleaners. Cleaners may have extraordinary access to secure places and may also owe a special responsibility to their employer or their employer's contractor.

128. Beyond that general point, Old Oak argued specific aspects of the relationship of Old Oak guards and Martin's cleaners. In Old Oak's contention, guards have an indirect role in discipline of cleaners because they monitor cleaners to ensure that they are not doing things that they should not be doing and because guards log incidents that could lead to discipline. Even if one characterized the guards' role in the fashion suggested by Old Oak, I am not persuaded that it results in a conflict on the facts of this case. First, I note that there were no examples of a guard report leading to discipline of cleaners, and no example of a requirement that guards testify in any forum against cleaners. Second, and more significantly, the guards' monitorial function in respect of the cleaners is far from intensive. I was not convinced that guards have any greater role in monitoring cleaners' activities than those of other persons in the buildings after business hours. While the guards may come across cleaners in the course of their patrol rounds, the same is true in respect of tenants and their guests who may be on the premises after business hours, and contractors who may be working on site. The guards perform no strict monitorial role in respect of either category of persons.

129. The evidence does not disclose that guards have some preventive role in ensuring that cleaners follow security rules. Although guards will take action where cleaners leave elevators unattended or fail to lock a tenant's doors, this occurs by chance in the midst of regular patrols. Guards have a role in ensuring that the building is secure. While cleaners might be responsible for a security breach, so might a tenant or maintenance staff. The guard has no particular duty that amounts to supervision of the cleaners. In fact, the patrol guards make no special effort to check on cleaners, despite the special access that cleaners have to the building through use of their own keys. And where guards have had problems with cleaners (e.g., allowing someone without an access card into the building after business hours), the

> guards have acted without hesitation as they presumably would have in the case of security breaches that did not involve a fellow union member.
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> 130. The guards role in provision of keys to the cleaners is not one that suggests significant monitorial responsibility. While there was some dispute about the degree of care with which Old Oak and the guards monitor the keys (e.g., whether the guards have an accurate list of the premises to which each key ring gives access), it is beyond doubt a relatively lax system. Cleaners are not required to formally identify themselves when obtaining keys, and guards have no business in monitoring to ensure that the cleaner takes only keys for assigned work areas.
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> 131. It is also important to note the sorts of duties that guards do *not* perform with respect to the cleaners. Guards do not search cleaners' lunch pails or other belongings. They do not follow or observe cleaners in the performance of cleaning duties. They do not perform surveillance or arrest of cleaners suspected of theft; on the one occasion where theft was suspected, outside security forces were used, to the consternation of at least the one Old Oak guard who testified in these proceedings. Although guards would stop a cleaner removing something that obviously ought not to be removed (e.g., a computer), they are not required to search cleaners to ensure against theft.
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> 132. A review of the Board's case law and of the evidence presented in this case regarding other workplaces illustrates that the role of guards at Old Oak in monitoring other employees is not nearly as intensive as in other workplaces. Old Oak guards do not search cleaners upon their entrance or exit from Old Oak premises. This is not an industrial workplace with tightly secured boundaries that can only be crossed with proper identification and by subjecting oneself to personal search. Indeed, Old Oak guards hand over keys to cleaners without any requirement of identification. Of course, there is nothing inherently wrong with this system. It clearly meets the security needs of the Old Oak location; there is no evidence of any problem with the system. The point is that some workplaces require more intensive security than Old Oak requires and that Old Oak requires a relatively low level of security.
>
> 133. On the scale of degrees of monitorial authority over a contractor's employees, Old Oak guards exercise minimal authority. Whether this factor is considered as part of the "extent of guards' duties ... protecting their employer's property" (under paragraph 14(5)1) or as part of "other duties or responsibilities of the guards that might give rise to a conflict of interest", I do not find that a conflict of interest would result.

25. As can be seen, section 14 of the Act only applies to security officers who monitor other employees or who protect the property of the employer. The extent of such activities is critical, although not the only factor, in determining whether the Board will find that a particular union cannot represent security officers to whom s. 14 applies. Therefore, much of the evidence of the parties was about monitoring, property protection, the degree to which the security officers interact with members of the applicant (the "staff") and the nature of those interactions.

26. As for monitoring, it is not at all clear to me that the security officers "monitor" employees, with one exception, unless all practical meaning is to be taken out of the word "monitor".

The Oxford Dictionary defines "monitor" (in part) as "regular surveillance over" which is, it seems to me, an accurate reflection of what s. 14 was meant to apply to. To give labour relations meaning to it, the word is meant to apply to security guards who watch employees while they work or while they are in the workplace. Here, the security officers are really monitoring the campus as a whole, all 800 acres of it, and there are only two officers at any one time conducting such monitoring. It may be that, in the course of their duties they will happen to see a staff employee of the University. However, even at that, it would be unusual for them to see the applicants' members who are actually at work except incidentally while they are moving about the campus.

27. Similarly, while it is true that the guards do protect the property of the employer, and that may be one of their primary jobs, it is also the case that such protection does not often occur in relation to the University's employees. The officers are not, for example, stopping employees, or searching their persons, cars, or lockers to ensure they are not stealing. In this case, while security officers protect the property of the employer, they do so primarily in relation to the general public or students. Any protection *vis a vis* employees is conducted in an indirect and incidental way. All of this occurs in a context where the area being protected is hundreds of acres and twenty-seven buildings.

28. There are occasions where the protection of property is more direct – as for when a security officer conducts cash escorts (1x per week) or opens locked doors for employees. Cash escorts represent a small part of the way security officers spend their time. Further, there is no suggestion security officers perform any property protection function when doors are opened. They are first there to check the door is opened and relocked.

29. The words "protect the property of the employer" have been in the Act for some time. In that regard s. 12 of the Act in place prior to the Bill 40 amendments to the Act (1992) stated:

> 12. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

30. In a case interpreting the old provisions, *Service Employees International Union Local 204*, [1986] OLRB Rep. Jan. 152, the Board stated:

> 2. Section 12 of the Act deals with "guards". It does not define what a "guard" is. The Board has consistently held that in order to be a "guard" within the meaning of section 12, and individual must exercise monitoring functions of a quasi-supervisory character with respect to *other employees in the bargaining unit*. In other words, they must perform duties (such as searching employee lunch boxes or investigating employee theft) which clearly place them in a conflict of interest with those employees. Employees who are essentially "watchmen" who protect the employer's property against third parties but do not intrude (as the employer's agent) in the employer-employee relationship, will not be treated as "guards" for collective bargaining purposes.

> 3. This Board approach was affirmed by the Supreme Court of Ontario (Divisional Court) in *Wells Fargo Armcar Inc. vs. Ontario Labour Relations Board et al.*, (1982) 36 O.R. (2d) 361. There the persons in question operated armoured cars, wore uniforms, carried fire arms, and were commonly described as "guards". The Board held that they were not "guards" for collective bargaining purposes. The Court agreed. In summary, then, section 12 is there to protect the interests of the *employer*: to ensure that persons whom the employer requires to monitor or investigate others would not face a conflict of interest between his responsibilities to that employer and his loyalties to other employees in the same bargaining unit.

31. In my view, these decisions are useful in interpreting what "monitoring other employees and protecting the property of the employer" mean. They support the conclusion that these terms must be interpreted in a labour relations context. Were it otherwise, it would be difficult to conceive of a security officer who did not spend a large majority of his/her time protecting the property of the employer. I find that the extent to which the security officers monitor employees or protect the property of the employer from employees is negligible and does not by itself create a conflict within the meaning of s. 14 of the Act.

32. I turn then to whether the security officers perform "other duties" that may create a conflict of interest.

33. As suggested by the Board numerous times in its case law there is no doubt that one of the "other duties or responsibilities" which may be a concern, is the investigation of employees. However, in this case, the only evidence before the Board is that security officers have not done this with respect to staff employees – it has been done by Mr. Denomme and other members of management. On the one occasion where a security officer did participate in an investigation of a university employee represented by the applicant and in any event directly supervised by Mr. Denomme – there was no possibility of a conflict of interest becoming manifest. Moreover, in my view, the mere taking of a report which may ultimately result in the investigation of a staff member (which will be conducted by management) does not create a conflict, or if it does it is negligible.

34. Another "other" duty which was highlighted by the employer was the potential and somewhat speculative obligation of security officers during a strike. Since, as a practical matter, a legal strike can likely only take place every 2, 3, or 4 years, and illegal strikes are very rare, it is clear that a strike would be a rare event. Instead, there has been only one strike among the staff over many years and it lasted for only a few hours. Having said that there can be no doubt that the security officers could be placed in a conflict of interest in a strike. It is not speculation to suggest they may be required to monitor the picket line, operate cameras and perhaps provide affidavits for use in injunctions. However, given how seldom a strike might occur, the conflict does not represent a serious issue. A conflict which might occur once ever many years is not what s. 14 of the Act is directed towards. If it was, virtually every security guard in the province would be excluded by s. 14.

35. I also do not accept that the provisions of LUSU's constitution create a conflict of interest. The provisions are not enforceable to the extent they require employees to engage in an illegal strike which would be the case if security officers respected a LUSU picket line.

36. Finally, the employer asserts that the security officers' duties with respect to parking would bring them into a conflict of interest position. There is simply little evidence about whether

the security officers could even know that they were dealing with LUSU represented employees, or how that would occur. The force of the employer's concern about this is in doubt in any event: LUSU represented clerks who work in the parking office accept payment of parking tickets and have the right to waive such payment even where the ticket is issued to a LUSU employee.

37. The employer relies on *The Municipality of Metropolitan Toronto*, [1997] O.L.R.D. No. 2659, a case in which the Board dealt with the transaction security officer provision which were in place at the time the new security officer provisions were placed in the Act. Although the application before the Board was not an application for certification, the issue before the Board was much the same as the issue before the Board in this case.

38. In *Metro Toronto*, the Board found that a conflict of interest existed and that security officers could no longer be represented by the union which represented many other employees at Metro Toronto. The factual differences between the case before the Board in that case and the facts before me are apparent from the following paragraph:

> 21. Applying the factors set out in subsection 14(5) to the case at hand, Ms. MacLean spends approximately 30% of her time engaged in what may be described as "passive monitoring" of other employees and approximately seven per cent of her time engaged in what may be termed "active monitoring" or the conduct of specific investigations into actual or possible employee misconduct. As a result, Ms. MacLean completes about one incident report per week involving her fellow union members. As indicated, these reports can and do lead to discipline. (Hence, union counsel's assertion that "the system works".) There were no suggestions that Ms. MacLean's experience is atypical in this regard. In our view, that is a substantial degree of monitorial duties and places Ms. MacLean in a conflict of interest situation regardless of whether she or other SOs have yet been called upon to testify in arbitration proceedings. In our view, the pressures of competing loyalties against which the statute seeks to guard can arise at any stage in the performance of SO duties, including passive monitoring, the conduct of specific investigations, and the preparation of incident reports. A requirement to give evidence at an arbitration hearing is but an acute expression of this conflict potential. In all of these circumstances SOs may be confronted with a choice between their obligations to the employer and their loyalty to fellow union members. Moreover, and apart from the article in the "all employee" collective agreement (which appears to have no direct application to SOs), nothing was placed before us to suggest that this situation in which the SOs find themselves has been ameliorated by any tangible internal union arrangements or by the guards inclusion in a separate bargaining unit. Indeed, as noted by employer counsel, the union appears to draw no meaningful distinction between the two bargaining units, at lest at the level of its committee structure.
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> ...
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> 23. With respect to the further evidence of Ms. MacLean – that she is not aware of any SO having been spoken to for union-related non-performance of duties – we have touched on this point above. We agree with employer counsel that, in the first instance at least, the Board's focus must be on the nature of the guards' duties and responsibilities, and not whether or not they have failed to perform them. As indicated earlier, however, this does not

> mean that Ms. MacLean's evidence is irrelevant. Obviously, at some stage, evidence that the performance of security guard duties have not resulted in any actual misconduct by SOs may cause the Board to question whether the SOs are indeed in a conflict of interest situation. However, that is not the case here. Given the substantial nature of the guards' monitorial responsibilities, the relatively independent manner in which they perform them, and the brief period of time covered by Ms. MacLean's evidence, the Board cannot be satisfied that no conflict of interest would result from the trade union continuing to represent the guards. In our view, the increase in the rate of incident reports must be seen in a similar light.

39. I agree with the Board's decision in *Metro Toronto* but find it of little application to the situation at Laurentian University. If the security officers completed one incident report a week involving LUSU members as opposed to essentially none and had they conducted investigations of such employees instead of management doing so, the outcome would be different.

40. The Board's decision in *Hawthorne Security & Communications*, [2007] OLRB Rep. Jan./Feb. 91 (January 23, 2007) is more relevant to this case. In that case, which involved a s. 14 objection, two security guards were usually on duty, protecting a large aerospace manufacturing facility. A security camera system was in place, but it was, like the University's, not directed towards employees, and unlike at the University, the guards occasionally searched employees' vehicles. The Board noted that geography played a large role in its assessment that no conflict of interest arose:

> 45. In my view an assessment of the degree of monitoring is influenced by the geography of the workplace. This is a large plant with many employees. Yet there are only two guards at most on duty at any one time. In the absence of a video surveillance system vastly different than the one in place, it is almost impossible to conceive of any way that the guards could effectively monitor AA employees. In fact they have many other duties which they are required to perform that also inhibit that ability. The truth is that all monitoring AA employees is incidental to the guards' regular duties.

41. A similar analysis applies to the University. The security officers are monitoring a massive property with numerous buildings and people. This geography makes it essentially impossible for any conflict of interest to arise given the existing duties of the security officers. The one area where a conflict could realistically arise – the investigation of incidents involving staff – has been largely negated by the practice of management conducting such investigations.

42. For all of the foregoing reasons, the Board finds that no conflict of interest within the meaning of the Act would be caused by the security officers being represented by the applicant.

43. There appears to be nothing preventing the Board from issuing certificates. If the Board does not hear from the parties within five days of the date of this decision certificates will issue to the applicant.

3369-08-U Schneider's Employees Association, Applicant v. **Maple Leaf Consumer Foods Inc.**, Responding Party

Estoppel – Unfair Labour Practice – Schneider's Employee Association brought a complaint that Maple Leaf had violated s. 70 of the Act by failing to provide the Association with the names of employees in receipt of weekly indemnity benefits – The employer brought a preliminary motion for dismissal of the application on the basis of issue estoppel, since the matter had already been decided by an arbitrator – The Board found that the arbitrator had correctly recognized his lack of jurisdiction to decide the issue, since it arose from a breach of the Act rather than a substantive provision in the collective agreement; the arbitrator's "in the alternative" opinion or *obiter dicta* was not dispositive of the complaint – The Board held that it had an obligation to ensure the protection of the rights granted by the Act, and as such had exclusive jurisdiction where a consideration of policy issues was required – The motion for dismissal was denied – Matter set down for hearing

BEFORE: *Brian McLean*, Vice-Chair, and Board Members *P. LeMay* and *D. A. Patterson*.

APPEARANCES: *Jeffrey M. Andrew* and *Dennis Lesperance* for the applicant; *D. J. Shields* and *Karen MacMillan* for the responding party.

DECISION OF THE BOARD: November 18, 2009

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") in which it is alleged the employer violated s. 70 of the Act.

2. The matter came on for hearing on October 19, 2009. At the commencement of the hearing the Board heard a preliminary argument made by the employer – that being that the Board should dismiss the application (or decline to inquire into it) because of issue estoppel. That is, that the issue in the application has already been determined by an arbitrator who made his decision with respect to a grievance filed by the union. This decision determines the preliminary issue.

3. This application claims that the employer's continual refusal to provide the union with the names of all employees in receipt of weekly indemnity benefits (the "Information") violates s. 70 of the Act. Section 70 of the Act states:

> 70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

4. The background facts are not in dispute.

5. The union sought the Information in mid 2007. The employer declined to provide the Information so the union filed a grievance.

6. Pursuant to s. 49 of the Act, the union requested that the Minister appoint an arbitrator to hear and determine the grievance. An arbitrator, Victor Solomatenko, was selected to determine the grievance and scheduled a hearing. At the arbitration hearing the employer took the position that the

grievance disclosed no violation of the collective agreement; that the arbitrator was without jurisdiction to adjudicate the alleged violation of s. 70 of the Act; and, in any event, the employer did not violate s. 70 of the Act. The union took the opposite position on each of the issues.

7. The arbitrator arguably made a ruling on all three issues. He first determined that the employer had not violated the collective agreement. He then decided he did not have jurisdiction regarding the s. 70 matter. With respect to his jurisdiction over s. 70 he stated:

> In my view, the legislation is absolutely clear that the interpretation and application of section 70 of the *Labour Relations Act* is within the exclusive jurisdiction of the Ontario Labour Relations Board. It is also my view that the arbitral jurisprudence supports that conclusion: see e.g., *Kenora Forest Products, supra*. Ultimately, the Association's grievance is based solely on an allegation of a violation of section 70 of the Act and not the breach of a substantive provision of the collective agreement. Furthermore, the resolution of this grievance is not contingent on an analysis that might involve the interpretation of the Act in pursuit of the interpretation of a collective agreement provision. In final analysis, this grievance is based solely on the allegation that the Company is in violation of section 70 of the Act and, as I have already indicated, I find that determination to be within the exclusive jurisdiction of the Ontario Labour Relations Board.

8. The arbitrator came to this conclusion despite s. 48(12)(j) of the Act which states:

> 48(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,
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> . . .
>
> (j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

9. However, despite his finding that he did not have jurisdiction, the arbitrator went on to decide the s. 70 issue. A former Vice-Chair of the Board, he did not conduct a cursory analysis. In three or four pages of reasons he reviewed the issues and arguments and found no violation of s. 70. Finally he stated:

> If the failure to provide a specialized list of names, as requested by the Association in this case, does in fact constitute interference with a union's general right to represent all members of a bargaining unit it is not a conclusion that arises either readily or logically out of the interpretation of the language of this collective agreement. Furthermore, I am not aware of any general principle of Ontario Labour Relations Board jurisprudence that supports such a proposition or conclusion. *On the other hand, if there is a legitimate basis to the Association's proposition that the lack of such a list of names constitutes interference with its capacity to represent the employees, I suggest it could only arise out of a policy consideration and determination properly enunciated by the Board in the context of its exclusive jurisdiction under section 70 of the Labour Relations Act.*
>
> (emphasis added)

10. The union then filed this application.

11. The employer's primary argument is that the arbitrator adjudicated the s. 70 issue and the result of that is binding on the parties and the Board. It says that if the union takes issue with the arbitrator's decision the correct course of action for the union is for it to judicially review that decision. To bring this application amounts to a relitigating of the dispute or a collateral attack on the arbitrator's decision.

12. The employer relies on *Danyluk v. Ainsworth Technologies* [2001] 2 S.C.R. 460. In *Danyluk* the Court was faced with an argument that the decision of an Employment Standards Officer precluded an employee from claiming unpaid commissions against her former employer in a civil action. The Court held that issue estoppel was "available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal". However, it also found that the application of the doctrine was discretionary and "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice".

13. The Court described the doctrine of issue estoppel as follows:

> 24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle, supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

> 25. The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

14. The Court found that the preconditions to issue estoppel were met in the case before it. However, it determined that it would exercise its discretion to permit the plaintiff's court action to proceed:

> 62. The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983]1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.
>
> 63. In *Bugbusters, supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:
>
> > It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.
>
> Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke, supra*, at paras. 38 and 43:
>
> > The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
> >
> > . . .

> …The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.
>
> See also *Braithwaite, supra*, at para. 56.
>
> 64. Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:
>
>> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result. …
>>
>> …
>
> 67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott, supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

15. The court went on to consider the following factors in deciding to exercise its discretion to have the matter heard:

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

(b) *The Purpose of the Legislation*

(c) *The Availability of an Appeal*

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

(e) *The Expertise of the Administrative Decision Maker*

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*
(g) *The Potential Injustice*

Decision

16. It is not at all clear to us that the arbitrator's decision made "in the alternative" is a binding decision or whether it effectively amounts to an "opinion" or "*obiter dicta*". Nevertheless, it is not necessary for us to make this determination. For the purposes of this decision we assume, without finding, that the pre-conditions to issue estoppel have been met.

17. Despite the fact that we assume the pre-conditions to issue estoppel have been met, the application of issue estoppel is discretionary, as the Court in *Danyluk* made clear, and in our view we

ought to exercise our discretion to permit the union's application to proceed. We note that the Court states that the list of factors set out in its decision, in determining whether to exercise discretion, is not exhaustive.

18. Our decision stems in measure from the Board's jurisdiction over alleged violations of the Act. Even where the Board defers an issue to arbitration – as it frequently does – it always or about always retains jurisdiction over the matter. The Board has an obligation to ensure that the rights set out in the Act are safeguarded.

19. In *Valdi Inc.* [1980] OLRB Rep. Aug. 1254, the Board discussed this issue (whether it will defer an unfair labour practice complaint to arbitration) in passages which are relevant to the issue before us:

> 7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶ 17,083; *John Inglis Co. Ltd.* (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶ 16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶116, 198 and *Collingwood Shipyards,* [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created. See *Kodak Canada Ltd.,* [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.,* [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex,* [1976] OLRB Rep. Aug. 427 at para. 4. *However, where key provisions of The Labour Relations Act require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual.* It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.,* [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House,* [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.* (1961), 61 CLLC ¶116,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited, supra. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate.* See *Imperial Tobacco Products (Ontario) Limited, supra,* for a

> full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard and Stephenson, supra,* that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.
>
> (emphasis added)

20. In our view, this case is the kind of policy case which the Board ought not to defer to arbitration and ought not to be deferential to an arbitrated decision, particularly one made after a finding that the arbitrator lacked jurisdiction. We note in this respect that it was the party asserting estoppel before us that took the position that the arbitrator had no jurisdiction. To use the words of *Valdi*: it is a case where a key provision of the Act, s. 70, requires important elaboration. Without reviewing the merits of the application, the idea that the union cannot obtain important information about the employees it represents from the employer concerns us. We are not sure how the employer's stance accords with the union's status as exclusive bargaining agent and would like to hear argument on this important point so that we can make a policy-based decision.

21. Importantly, our reading of the arbitrator's decision is that he did not assess the s. 70 complaint with the kind of policy driven analysis that the Board applies. Our conclusion arises from his statement "On the other hand, if there is a legitimate basis to the Association's proposition that the lack of such a list of names constitutes interference with its capacity to represent the employees, I suggest it could only arise out of a policy consideration and determination properly enunciated by the Board in the context of its exclusive jurisdiction under section 70 of the *Labour Relations Act*.". It would be inappropriate to decline to inquire into the matter where the parties have not had the benefit of the kind of analysis the Board is charged with applying.

22. Finally, we are also concerned that the Divisional Court would not hear a judicial review of the arbitrator's decision on this issue particularly if the arbitrator's decision in respect to his jurisdiction is upheld. If that is the case, the union has no effective appeal right.

23. The matter is referred to the Registrar to be set down for hearing.

0723-08-R; 1037-08-R; 0811-08-U Teamsters Local Union No. 419, Applicant v. **Metro Waste Paper Recovery Inc.** c.o.b. Metro Municipal Recycling Services Inc., Responding Party v. The K.A.S. Group of Companies Inc., Intervenor; Teamsters Local Union No. 419, Applicant v. Metro Waste Paper Recovery Inc. c.o.b. as Metro Municipal Recycling Services Inc. and The K.A.S. Group of Companies Inc., Responding Parties

Bargaining Unit – Certification – Related Employer – KAS, a long-term employment agency, supplied Metro with employees to operate a plant in Scarborough – Metro contracted out its core functions at the plant to KAS employees – In response to Metro's claim that they had no employees in the proposed bargaining unit, the union launched a related employer application under s. 1(4) of the *Labour Relations Act* – The Board asked which employer had fundamental control over working conditions, and whether or not the two employers were both functionally integrated with respect to the operation of the plant – The Board found that both

KAS and Metro exercised direction and control over the employees performing the work, and together facilitated the operation of the plant – There were many examples in the evidence of KAS and Metro sharing decision-making regarding KAS employees – Certificate issued to the applicant – KAS and Metro declared a single employer

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Mark Wright* for the applicant; *Alan McConnell* and *Robert Loeffler* for Metro Waste Paper Recovery Inc. c.o.b. as Metro Municipal Recycling Services Inc.; *Christopher M. Andree* and *Kirk Schizas* for The K.A.S. Group of Companies Inc.

DECISION OF BOARD: November 2, 2009

1. Board File No. 0723-08-R is an application for certification. Board File No. 1037-09-R is an application under section 1(4) of the *Labour Relations Act, 1995* (the "Act") (the "related employer application"). The related employer application is present because in the application for certification the responding party Metro Municipal Recycling Services Inc. ("Metro") says it has no employees in the "all employee" bargaining unit applied for by the union. It says that all of the employees working at the facility which is the subject of the application are actually employees of K.A.S. Group of Companies Inc. ("KAS"). KAS agrees with Metro. The union, therefore, seeks to have KAS and Metro declared to be a single employer. As a result, the issues in this case are: 1) the identity of the "true" employer of the employees at issue, and 2) regardless of who is the employer of these employees, whether the Board should declare KAS and Metro to be a single employer under s. 1(4) of the Act. The Board held hearings over several days to receive the evidence and argument of the parties regarding these issues.

2. Because of the related employer application, the corporate parties led considerable evidence about the corporate structures and ownership of KAS and Metro. However, in the result, the union concedes that KAS and Metro are two separate independent arms length corporations which are not under common control at a corporate level. The union does, however, assert that there is common control at the facility which is the subject of these applications. Therefore, it is only necessary to briefly sketch out this evidence.

Background Facts

3. Metro Waste Paper Recovery Inc. ("Metro Waste"), the co-owner of Metro, is a recycling company. That is, it is a company in the business of collecting, sorting, distributing and marketing recyclable refuse. It obtains recyclable product from businesses, office towers, residential units etc. After the product is collected and sorted it is sold to customers such as paper mills and plastic companies who convert it into useable material. Metro Waste has plants in Canada and the United States which employ about 750 employees in total. In addition, it uses approximately 190 agency employees from a variety of temporary worker suppliers at any one time to supplement its employee complement.

4. KAS is a temporary employee agency. It has eight branch offices which service approximately 250 customers and employ numerous employees in Ontario. KAS also provides payroll services and various health and safety services to clients. KAS's main business is in

providing employees on a long-term basis. It does not view itself as a "temporary" employee agency in the way that some other employment agencies do.

5. Long prior to the events which give rise to this application, the City of Toronto took requests for proposals to deal with the recyclables it collects as part of its "blue box" program. Metro Waste was interested in obtaining the work and entered into an agreement with another arms-length company, Atlantic Packaging. Atlantic Packaging is an end user (customer) for recyclable products. Metro Waste and Atlantic Packaging formed a company, the responding party Metro, with each being a 50% shareholder. Metro bid on the City of Toronto work and won the contract.

6. After winning the contract, Metro established a sorting facility in Scarborough, renting space from Metro Waste which has a sorting facility at that location. Metro operates the plant using employees provided by KAS. That operation is not the subject of this application.

7. The operation which is the subject of this application had its genesis when in or about 2005 the Region of Durham (the "Region" or "Durham") issued a RFP for a corporation to help it set up and operate a recyclable sorting plant in the Region. Metro submitted a proposal in 2006, won the business and it is that facility which is the subject of this application.

8. Under the Durham contract, Metro was to build and operate a recycling centre in Whitby. That is, Metro would construct the facility, buy the equipment on Durham's behalf, use its expertise to set up the facility as an efficient operation and then operate the facility. The entire operation would be owned by Durham throughout. Under the contract, Metro would operate the facility for five years and the employees that work there were to be Metro's and not Durham's. Like everything else at the facility, Durham owns the material coming in the facility and the sorted recyclables leaving the facility.

9. Metro had expertise in the designing of a recycling facility and in setting up the various machines to provide optimal workflow and efficiency. Some KAS employees had some knowledge in these concepts from working at the Scarborough site.

10. Metro decided it would use a labour contractor to supply all or most of the labour at the Durham facility. Prior to submitting its bid to the Region it asked KAS for information about wage rates in the area and used that information in preparing its bid. After winning the contract it requested proposals from a number of temporary worker providers including KAS. Metro's evidence was that Metro was open to any labour supply company winning the contract. I am suspicious of this evidence. It is clear that Metro had a strong pre-disposition to KAS getting the contract assuming its bid was competitive, and ultimately selected KAS even though it was not the lowest cost provider.

11. Mr. Kyriaco Schyzar, a part owner of KAS, testified that KAS had a business philosophy of not engaging in the lowest end of the employee supply business. He had found that if employees are not paid enough there is too much turnover to make the operation profitable. KAS' bid was based on wage levels which were in his view high enough to ensure employees were retained at a reasonable level. (Despite this claim, and while part of the work force has been stable, it is apparent that the turnover at the Metro facility is quite high.)

12. KAS was awarded the contract in late 2007. Over the next few months the facility was constructed. KAS did not have a local office and therefore did not have a ready cadre of employees

to fill the spots at the facility. Accordingly, in 2007, it conducted a job fair. It placed an advertisement in a local newspaper, the relevant portion of which is as follows:

> **HUGE JOB FAIR!!!**
>
> KAS Group is currently recruiting for one of our largest clients in the recycling industry, Metro Municipal Inc. They are currently seeking full time day shift workers in Durham Region. Their facility is located at Tauton & Garrard in Whitby.
>
> Available positions include:
>
> - 38 Sorters (starting @ $11/hr),
> - Forklift Operators,
> - Loader Operators,
> - Maintenance mechanics,
> - Bailer Operators.
>
> This is a dusty environment. SAFETY SHOES A MUST.
>
> All those interested are asked to apply in person with a void cheque, Social Insurance Card and Photo ID:
>
> **Friday, November 9, 2007 1pm-7pm**
> **Saturday, November 10, 2007 9am-3pm**
>
> For more information call [KAS tel. #]

13. KAS held the job fair at a local Hotel. At the job fair six KAS managers took and reviewed resumes, conducted interviews and administered some health and safety training and tests. Metro did not assist KAS in interviewing potential candidates or participate in any other way.

14. KAS provides workers to Metro pursuant to a "Master Services Agreement". Under that Agreement the employees provided to Metro are all to be employees of KAS. Under the Agreement Metro pays KAS's service fees "at the hourly rate set out in Schedule B to the agreement". Schedule B has a list of positions with an hourly fee for each position. KAS's fee is therefore an hourly wage plus a percentage mark up.

15. Under the Master Services Agreement KAS is responsible for all employment payments and remittances due to or in respect of the employees. KAS invoices Metro weekly and Metro is required to pay KAS monthly. The Agreement is terminable on 90 days notice, or for cause.

16. KAS supplies employees to Metro in seven classifications:

i) front end loader operators
ii) fork lift drivers
iii) balers
iv) comparators
v) sorters
vi) lead hands

vii) maintenance.

17. Under the Agreement KAS warrants that the staff it provided shall be "qualified and competent and have the appropriate training, skills and experience to perform the directions assigned to them". Metro is required to co-operate with KAS, operate the facility in a lawful manner, and allow KAS to conduct health and safety inspections and investigate accidents at the facility.

18. In addition, the services KAS was to provide are as follows:

> Schedule "A"
> SERVICES
>
> K.A.S. shall be responsible for all aspects of the supply of human resource services to the Facility as same pertain to the handling and processing of recyclable materials entering the Facility including related supervisory staff to manager the staff directly handling and processing the recyclable materials.
>
> More particularly K.A.S. shall be responsible for:
>
> 1. recruitment and hiring of all K.A.S. Staff at the discretion of K.A.S. including all related advertising, conducting interviews, testing, reference checking and communicating offers of employment;
>
> 2. advising K.A.S. Staff of the scope of work and employment relationship with K.A.S.;
>
> 3. providing Facility orientation and ongoing training of K.A.S. Staff;
>
> 4. determination of wages and pay increases for the various positions of the K.A.S. Staff at the Facility;
>
> 5. forming a health and safety committee to ensure compliance of the Facility and operations with all governmental regulations ;
>
> 6. ALL aspects of the management of Workplace Safety Insurance Board ("WSIB") functions as required by the Province of Ontario, including filing of WSIB paperwork and managing WSIB claims;
>
> 7. all aspects of disciplinary needs of the K.A.S. Staff to be managed in accordance with the existing and future policies of K.A.S. and Ministry of Labour guidelines;
>
> 8. communications with K.A.S. Staff and resolutions of all issues and concerns of the K.A.S. Staff;

9. all payroll functions including, without limitation, tax withholdings and submissions, CPP, EI, EHT withholdings and submissions, statutory holiday pay, vacation pay and WSIB remittances;

10. all aspects of termination of employment of K.A.S. Staff;

11. administrating and scheduling all vacation time and ensuring that the requirements for human resources in the Facility are met on a daily basis, managing all other scheduled or unscheduled time off; and

12. compiling information on a weekly basis for purposes of both payroll to employees and invoicing for Services.

19. KAS handles all workplace injuries including dealing with the WSIB. However, Jorge Arauz Sr., the only full-time Metro employee on site, may call an ambulance in case of an accident. KAS management keeps all employee files. Metro has no employee files for the KAS employees.

20. While the Agreement provides that KAS will supervise the employees it supplies, there was no provision for a full-time KAS supervisor at the plant. Instead, KAS was to provide two or three lead hands, who earned wages that were generally higher than most employees but lower than maintenance employees supplied. "Supervision" was to be provided by KAS. Client care specialists Danny Kahn and Jody Spence would deal with issues remotely and occasionally attend at the facility (after the start up period two half days per week). The parties agree that lead hands are not to be excluded under s. 1(3)(b) of the Act and are therefore in the bargaining unit.

21. Brad Brooks, Metro's Manager of Municipal Contracts is the most senior member of Metro's management team with responsibility for the Durham plant who regularly attends at the facility. Mr. Brooks was responsible for costing out the employee costs for the RFP submission. He also was responsible for hiring a labour subcontractor, which ultimately was KAS.

22. Mr. Brooks' main responsibility is to ensure that Durham Region is satisfied with the way Metro is operating the plant with a particular emphasis in ensuring that complaints from the Region about quality issues are appropriately dealt with. In this regard, Mr. Brooks will frequently confer with Mr. Arauz Sr. about quality issues.

23. Mr. Brooks is also concerned with KAS's performance. In this regard, attendance issues are a concern at the plant. In order to reduce the impact of attendance issues, Mr. Brooks directed KAS to try to cross train employees at work so that employees could more easily fill in for absent employees. KAS resisted the suggestion. Mr. Brooks is also ultimately responsible to ensure that Metro gets charged the appropriate rate and that employees get paid the appropriate rate. KAS sends its accounts to Mr. Arauz Sr. for his review and approval. It goes without saying that Mr. Arauz Sr.'s participation in the review of accounts is meaningless unless he has some idea of who is present at the plant.

24. Mr. Brooks attends at the facility about twice a week to assist Mr. Arauz Sr. to deal with special issues like "dealing with the Region" and contractor issues. He also inspects the product to make sure it meets specifications. Mr. Brooks also attends health and safety committee meetings

because safety issues are directly connected to the equipment and, *vis-a-vis* the Region, health and safety is Metro's concern.

25. Mr. Brooks, Mr. Arauz's immediate supervisor, described Mr. Arauz Sr.'s duties as being typical of a plant manager. That is he "oversees the whole operations of the plant"; he "co-ordinates all contractors who come at the site"; "makes sure they do what they are supposed to do"; and ensures health and safety on the site. He "looks at the staff" to make sure production is appropriate.

26. Mr. Arauz Sr. described a typical day of his. He testified that in the morning he arrives and does a walk around the plant to make sure the equipment is functional and safe. He then goes to the tipping floor (where material is dumped by trucks to be sorted) to see if it is full and reviews the inventory levels of sorted product. He then goes to his office, does paperwork, reviews and sends emails, and makes telephone calls.

27. Most of the KAS employees are sorters who sort material on different lines. Other KAS employees operate front end loaders to move material around and there are two maintenance employees and two or three lead hands.

28. Mr. Arauz Sr.'s evidence was that in his view his job is to ensure the equipment is working properly and that they produce good quality product in an efficient and timely fashion.

29. In his view he did not supervise or monitor employees. He did not really even look at the staff. That was up to KAS. If employees have needs they go to lead hands or contact KAS's client service specialists, Ms. Spence and Mr. Kahn.

30. Mr. Brooks was asked in examination-in-chief about his dealings with KAS lead hands. He testified that there were a variety of issues that had to be dealt with right away. For example they would ask the lead hand to look at issues surrounding poor quality product. They would tell them to improve the quality.

31. Lead hands started work at the facility on December 7, 2007. They started ahead of other employees so they could be trained. At this time, Mr. Arauz Sr. explained to the lead hands how the system worked. Mr. Arauz Sr. explained that according to the setup there were certain locations where employees had to be located and the number of employees required in each location. The lead hands followed these instructions once the production employees arrived on site.

32. Mr. Arauz Sr. described his dealing with lead hands as mostly occurring at the start of the shift. He asks the lead hands if there are enough employees to run the lines. If there are insufficient numbers, as there often are, Arauz Sr. will ask the lead hand whether they have called KAS and asked what they are going to do about it. Sometimes, he will call KAS directly.

33. Mr. Arauz Sr. described the duties of lead hands as being:

i) look at the equipment to make sure it is in good working order;

ii) distribute safety equipment to employees;

iii) ensure there are enough employees to operate the equipment. If insufficient employees showed up they would call Ms. Spence or Danny Kahn. Mr. Arauz Sr. testified this was done because he "needs the people to run the line";

iv) tell the various employees who is to work on each work location on the line.

34. Mr. Arauz Sr. relies on lead hands to make the plant run smoothly. If lead hands have issues they are to call one of KAS' supervisors, Jody Spence or Danny Kahn although in practice they also sometime speak with Mr. Arauz Sr. Metro did not pay for Spence or Kahn's wages.

35. Mr. Arauz Sr. testified that if he saw something not being done or being done incorrectly he would call KAS or speak to a lead hand (a bargaining unit employee) and tell them to do something about it. Mr. Arauz Sr. denied in cross examination that the lead hands were his eyes and ears. However, he did acknowledge that he was not on the floor all of the time and they would have to tell him the things that went on.

36. In Mr. Brook's view KAS's job was to supply "us" with the labour able to do the job. Mr. Brooks testified about what he perceived as the drawbacks to agency employees. He said "we see someone" doing something improperly and "we ask that they be reprimanded" but "we keep seeing the same thing being repeated". In his view, if they were Metro employees they could deal with problems directly.

37. Mr. Brooks gave an example where there was a KAS employee who only did cleaning. Metro wanted the employee to also sort but the employee refused. Metro would have fired her but KAS kept her on.

38. KAS employees go directly to the Metro facility in Durham everyday. There is no suggestion that they are called each day or ever see KAS's office. They simply go to work on a regular schedule. KAS employees use Metro's lunchroom.

39. Ms. Spence and Mr. Khan described their dealings with employees in a log book located at the Metro facility. That log book was put into evidence and, in my view, represents the best evidence of the activities of Mr. Khan and Ms. Spence during the period in question. It is clear that the vast bulk of their employee related activity was spent dealing with employees who called in sick, were on vacation or were absent in any other way. This is not surprising: KAS's main job is to ensure that there are adequate number of employees each day to perform the required functions.

40. Both parties are involved in health and safety issues. This is at least in part because under the *Occupational Health and Safety Act*, "employer" is defined as including "a person who contracts for the service of" workers. In fact, the Region is also probably an employer under the OHSA and therefore insists that it be kept notified of safety issues including workplace injuries.

41. Mr. Arauz Sr. speaks to employees about safety issues if there is an immediate problem or, if the problem is less severe, he speaks to KAS management or a lead hand about the problem.

42. Both Metro and KAS send representatives to Joint Health and Safety Committee ("JHSC") meetings. In the minutes, put into evidence, the co-chairs of the committee were Mr. Arauz Sr. and Frazer Rife, a lead hand. Ms. Spence is the secretary of the JHSC and prepares the agenda. The agenda is created by any person calling her with an agenda item.

43. If an employee is injured at work KAS deals with it and informs Mr. Arauz Sr. Mr. Arauz Sr. then informs the Region.

44. Metro supplies all safety equipment to KAS employees without billing KAS. This includes gloves, safety glasses and hearing protection.

Discussion

45. In *Pointe-Claire (City) v Quebec (Labour Court)* [1997] 1 S.C.R. 1015 the Supreme Court of Canada discussed the criteria for establishing the identity of the "true" employer at para. 48:

> According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the Labour Code, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

46. To a large extent, the Supreme Court's decision validated the long standing approach taken by the Board in dealing with these issues:

> 49. In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify the real employer in a tripartite relationship. Most of the decisions of those agencies, and specifically the Ontario Labour Relations Board ("OLRB") and the Canada Labour Relations Board ("CLRB"), have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, inter alia, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of a series of factors that are similar to those suggested by the comprehensive approach set out in Vassart and in the Court of Appeal's decision in the instant case.

47. The Board's approach to establish who is the employer is described in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645:

> (1) the party exercising direction and control over the employees;
>
> (2) the party bearing the burden of remuneration;
>
> (3) the party imposing discipline;
>
> (4) the party hiring the employees;
>
> (5) the party with authority to dismiss the employees;
>
> (6) the party who is perceived to be the employer by the employees; and
>
> (7) the existence of an intention to create the relationship of employer and employee.

48. Finally there is a useful discussion of the Board's test and in particular the weighing process the Board considers in analyzing the factors in *533670 Ontario Ltd. (c.o.b Best Personnel Services)* [1997] OLRB Rep. September/October 849:

> 13. None of these factors is necessarily determinative, and the relative significance of any individual factor will depend on the circumstances of the particular case. Having said that, it is apparent that the object of the exercise is to assess the various factors, both individually and in the context of all the other factors, in order to ascertain who has fundamental control over the employment relationship, particularly where the factors point in different directions. In making the assessment and determination, the Board is more concerned with substance than with form; that is, the Board will not permit commercial form to obscure labour relations reality.
>
> 14. A natural consequence of this is that the first five factors listed in *York Condominium, supra*, which are indicators of control, have become more important than the last two, which are both more subjective and difficult to gauge. This is consistent with the Board's preference (and the underlying theme of the Act as demonstrated by provisions like subsection 1(4) and section 69) for substance over form, and with the principle that perception and impression cannot be determinative of a question of law (see, *International Union of Canada and Kent Line Ltd.*, (1972) 27 D.L.R. (3d) 105 (Federal Court of Appeal).
>
> 15. When it comes to a question of fundamental control, there is little which is more important than beginning the relationship (hiring), regulating it (direction, control and supervision) and ending it (termination). Accordingly, *York Condominium, supra*, factors 1, 4 and 5 have gained primacy. Indeed, even though the Board (and arbitrators) have been careful to say that it will not necessarily be determinative, decisions like *Dare Personnel, supra, Sylvania Lighting, supra*, and *Royal Ontario Museum, supra*, demonstrate that direction and control is a very significant factor. At the same time, these decisions also demonstrate that the perception of the

> employees, and commercial contracts as indicators of intention often carry little weight.

49. Consistent with the decision in *Best Personnel, supra,* the Board frequently considers discipline and discharge together and considers the last two criteria little if at all. With these considerations in mind it is appropriate for the Board to review the detailed facts within the context of the *York Condominium* criteria.

Direction and Control over the Employees Performing the Work

50. Metro is responsible for the overall operation of the plant. Metro establishes the hours of work and conveys these hours to KAS. There are occasions when overtime is required and when a shift will be cancelled due to a shortage of material. Metro is responsible for making these decisions. Metro sets the production target rate which is expected of sorting employees.

51. Mr. Arauz Sr.'s evidence in examination-in-chief was that he does not monitor employees and does not even talk to the employees apart from short social visits. In his view KAS has the full responsibility for direction and control over the employees when they perform the work.

52. In cross-examination, the union challenged Mr. Arauz Sr.'s evidence in this regard. Based on the answers, Mr. Arauz Sr. gave in cross-examination and the various examples of employee intervention, I do not accept Mr. Arauz Sr.'s testimony. In my view, it is clear that both KAS and Metro exercise direction and control over the employees performing the work.

53. The starting point for my conclusion is Mr. Arauz Sr.'s dealings with the lead hands. It is important to emphasize here that the KAS lead hands are agreed to be employees. That is, they do not exercise managerial functions and would be in any bargaining unit and represented by the union. This means that when Mr. Brooks or Mr. Arauz Sr. tells a lead hand to improve quality, for example, they are giving direct instructions to KAS "bargaining unit" employees.

54. In Mr. Brooks' view at least, the plant manager "communicates through" the lead hands or sometimes goes to KAS management (Jody Spence or Danny Kahn). Mr. Arauz Sr. testified that if he gets a complaint about quality then he will go to the lead hands and tell them to pay attention to the particular area where the quality issue arose. For example if there was too much aluminium in the bales he would tell the lead hand to correct the problem. Mr. Arauz Sr. also conceded in cross-examination that if he sees someone doing something wrong he tells them the right way to do it and then goes to the lead hand and says that you should be doing a better job. However, he testified that in doing this he was overstepping his bounds unless it was safety issue.

55. Both Mr. Brooks and Mr. Arauz Sr. testified that there had been a problem with a lead hand coming in late. Accepting KAS/Metro's theory of the case this should not have been of a concern, except with regards to payment. However, it clearly was a serious concern and Mr. Brooks or Mr. Arauz Sr. spoke to KAS about it and the problem was resolved.

56. A lead hand, Marco, testified that if he encountered a production problem he would try to fix it. If he was unable to resolve the problem he called Mr. Arauz Jr. (another lead hand). If he was unable to solve the problem they would call Mr. Arauz Sr.

57. KAS's main responsibility is to ensure that sufficient employees were at work to run the machines. It is therefore responsible for approving holidays, vacation etc. and for finding replacements for sick leave. While KAS's evidence was that this was KAS's sole responsibility without input from Metro the following email sent by Mr. Arauz Sr. to Ms. Spence suggests otherwise and also sheds light on how Mr. Arauz Sr. perceives his role:

> Jody, we have a problem with personnel and I need a solution as soon as possible. There are 5 people off today from the fiber line and 1 that is going early at 9:00 am from the container line. This situation has been going on for sometime now with people taking days off here and there and also several people taking days off two at the time on the same day. What I see is when people request a day, it is given right away. This has to stop immediately!!!!. If this has to happen, the day has to be booked ahead of time and a proper replacement must be provided for that day. From now on only one person will be allowed to book a day off from both lines combined and this has to be booked way ahead off time. Doctor's appointments and court days are given way ahead of time so nobody can come and book a doctor's or court's appointment from the day before. Please make the proper arrangements so We don't need to be in this situation again.

58. While Mr. Arauz Sr. testified that he does not monitor KAS employees Mr. Brooks confirmed that Metro has the power to monitor the performance of KAS employees. In the evidence before the Board the extent to which this was actually done is difficult to determine. However, there is evidence of several instances where this must have occurred.

59. Mr. Brooks also testified that Mr. Arauz Sr. monitors employees' hours of work. It comes to his attention if an employee is late or absent. Mr. Arauz Sr. will also bring performance issues to KAS's attention.

60. Marco testified that he talks to Mr. Arauz Sr. every day because he has to be informed. However, in his view, Mr. Arauz Sr. "never" addressed KAS employees directly. He would generally speak with the lead hands if he had a problem with an employee. Of course, as noted, the lead hands are themselves KAS employees.

61. Training for new employees is done by lead hands and by Ms Spence. However, when the plant was opened KAS, Metro and the manufacturer of the equipment performed joint training sessions. In these sessions and for the first few weeks lead hands asked technical questions of Ms. Spence, Mr. Arauz Sr., Mr. Arauz Jr. and the manufacturer's representatives. In particular at the start, Mr. Arauz Sr. told KAS where it needed people on the line and what to watch out for. Those directions have been followed since then.

62. On April 9, 2008 Mr. Arauz Sr. called Ms. Spence and asked her to put together a letter for everyone telling them not to throw cigarette butts anywhere but in the ashtray provided. He advised her that if he finds anyone flicking butts on the ground they will be sent home. Ms. Spence sent the memo as required to be attached to cheques.

The Burden of Remuneration

63. The financial relationship between Metro and KAS is typical of situations where a company uses an employment agency to supply some or all of its employee needs. That is, KAS supplies the employees who are paid an agreed wage by KAS and Metro. Metro pays KAS the amount of the wage plus a percentage mark up to cover KAS's overhead and the amount it must pay out for employment benefits of all kind plus a profit. KAS employees do not yet participate in a KAS benefit plan.

64. Every quote that KAS makes to obtain business identifies a wage rate and a charge rate (the mark up). When the client accepts the bid, it accepts both numbers. KAS witnesses testified that there may be circumstances where it seeks to increase a wage rate beyond the contracted amount. KAS will go to the client and "present the case" for a higher wage rate. It is open to KAS to increase the wage rate even if the client refuses. While this has occurred at other clients, it has not occurred at Metro. Indeed, there was one occasion that a maintenance employee was quite upset about his pay, KAS went to Metro on his behalf and Metro declined to grant an increase. KAS did not raise the employee's pay on its own.

65. The wage rates are agreed. In addition there are agreed-to wage increases at certain intervals (*ie.* after 3 months employment). KAS notifies Metro when an employee reaches the three month increase point and seeks Metro's approval to grant the increase. Mr. Arauz Sr. checks to make sure that the employee was at the facility for three months and then approves the increase. While KAS and Metro argued that there was no "approval" because the increases were contractual, the emails between the parties are clear: KAS - "Here is the recent round of increase – please approve this". Mr. Arauz Sr. "I am ok with this".

66. These are the kind of circumstances where the Board has frequently found that the client (Metro) bears the ultimate burden of remuneration.

67. KAS and Metro argue strenuously that either this case is different or that those other cases were wrongfully decided.

68. I disagree. First, although KAS claims the legal responsibility for paying the wages it may be the case that if KAS did not pay wages employees could look to Metro for payment. I note that the kind of "who is the employer" issues which arise under the Act also arise under the Employment Standards Act (the "ESA") (see, for example, *Bayer Inc. v. Elliott* 2005 CanLII 38076). I note that recent amendments to the ESA, which go into effect on November 6, 2009, appear to answer the issue.

69. Second, I am satisfied that it is Metro which determines what employees are to be paid. KAS and Metro witnesses testified that KAS could and did set the wage rates and that if Metro did not want to pay an employee an amount that KAS could pay that amount and then bill Metro for the wage that KAS wanted to pay. I have little doubt that this is technically true. However, it has never happened and nor is it likely to ever happen. In real life what has happened is that KAS asks Metro permission to pay employees a particular wage. Even agreed to wage increases (an increase after 3 months) were passed to Mr. Arauz Sr. for approval. Jody Spence's note in the logbook demonstrate which entity has the real power over wages:

> Danny and I spoke with Brad Faulkner re pay issue. He wants $21/00 per hour but Brad Brooks/Jorge [Sr] say no way. They would be willing to give him an extra $1.00 per hour – bring him to $18.00 per hour. He was not happy about that but will accept it. Asked if it might be possible for them [Metro] to pay for his welding course. Danny to speak to Tony about that. Danny also told Brad that we will pay him an extra hrs for travel time whenever he goes to Thormount [Metro facility in Scarborough]. [There was] no evidence about whether Metro would be billed for that time].

70. Similarly, when Mr. Arauz Jr. was due a scheduled raise, Ms. Spence sought approval of the increase. However, Mr. Arauz Sr. advised her that he had held it back because of a disciplinary issue. On another occasion an employee spoke to Mr. Brooks about getting a raise. Mr. Brooks told the employee that he would not get a raise because he had not been performing well. Mr. Brooks knew this from Mr. Arauz Sr.'s comment about the employee.

The Party Imposing Discipline and Discharge

71. This is an *indicium* which points to neither party as both entities have a role in discipline and discharge.

72. Metro and KAS witnesses testified that it was KAS who decided whether employees should be disciplined and if so what level of discipline to impose. They relied on a number of events.

73. In April 2008 there was damage done to a door. A lead hand told Mr. Arauz Sr. about the damage and Mr. Arauz Sr. went to speak to the two employees. Mr. Arauz Sr. advised KAS of the damage and the fact that the damage was caused by either one of two employees and asked that they be disciplined. Ms. Spence investigated, both employees denied causing the damage, and Ms. Spence advised Mr. Arauz Sr. that she "could not possibly discipline them for something they didn't believe they did".

74. In April 2008 two employees, Rob and Christine, were wearing earphones while working. Ms. Spence told them they should not be listening to music while on the line. Mr. Arauz Sr. said he wanted it documented because this was the second time for Rob. Mr. Arauz Sr. told Ms. Spence about Rob on an earlier occasion but Ms. Spence explained that because he did not tell her right away there was nothing she could do about it. She also told Mr. Arauz Sr. that if there is something done that he needs to call her right away so she could come and deal with it then and there.

75. In March 2008 Mr. Arauz Sr. advised KAS that an employee, Carleon, had been using the company "mike" to send personal text messages. Mr. Arauz Sr. told KAS that "they are done with him" and needed to use another employee, Dave, as his replacement. KAS replaced Carleon with Dave.

76. In May 2008 an employee Dave was given a verbal warning by Mr. Arauz Jr. and Mr. Arauz Sr. (together) for running the line empty because Dave took a break to chat with one of the drivers.

77. In late April 2008 Mr. Arauz Sr. called Ms. Spence about damage that Arauz Jr. had done to a wall. Mr. Arauz Jr. was likely given a written warning. In addition, and as noted, Mr. Arauz Sr. delayed putting through Mr. Arauz Jr.'s wage increase because of damage to the wall.

78. In May 2008 Mr. Arauz Sr. advised KAS that an employee Eric had damaged the inside of a trailer. Mr. Arauz Sr. told KAS that he wanted them to have Eric fill out an incident report and then possibly give him a warning since it was his fault.

79. Mr. Arauz Sr. told a lead hand that an employee, Rob, was a "very careless employee".

80. In late May 2008 Arauz Sr. received a call from a manager of a trucking company which delivers material to the facility that a KAS employee, Dave, had been sexually harassing a female truck driver. Mr. Arauz Sr. called KAS and told them "you guys better do something about this. It is serious". Ms. Spence and Mr Kahn attended at the plant and met with Mr. Arauz Sr. and the complainant's supervisor. Later they met with Dave. Mr. Arauz Sr. was present during this interview. Ms Spence and Mr. Kahn each testified that they did not know why Mr. Arauz Sr. was present during the meeting and that they had not asked him to attend. Mr. Arauz Sr. testified that Danny asked him to be there for the meeting. However, Mr. Arauz Sr. played no role in that meeting. Ms. Spence and Mr. Kahn decided to discipline Dave without input from Mr. Arauz Sr.

81. Mr. Arauz Sr. was advised by an employee that there had been a fight in the lunchroom and there was damage. Mr. Arauz Sr. called Ms. Spence, was upset and said there was "grounds for dismissal". Mr. Arauz believes that nothing was done about it by Ms. Spence and he was therefore really upset.

82. Mr. Arauz Sr. was also concerned about the way another employee, Rob, was dealt with. He was caught smoking at the back of the plant. Mr. Arauz Sr. told KAS: "you have to do something about it". Also Rob used to yell and scream while on the line. One day the police came looking for him and he ran away. Marco, the lead hand, testified that he had a concern about Rob. He repeatedly expressed his concern to Ms. Spence but nothing was done. Therefore, he took his concerns to Mr. Arauz Sr.

83. I am satisfied that the ultimate authority to discipline rests with KAS. However, on occasion Mr. Arauz Sr. would speak with an employee directly. Moreover, it is usually Mr. Arauz Sr. that notifies KAS of a disciplining problem and makes suggestions about what ought to be done. Generally, although not always, he makes a complaint about an issue and it gets dealt with.

84. As for discharge, Mr. Brooks testified that he could not get rid of a KAS employee. The most he could do was to ask KAS to transfer an employee and they can indeed refuse. I did not believe Mr. Brooks' testimony and I doubt that he believed it. The plant is effectively Metro's property. It certainly can order any KAS employee not to be on the property. Mr. Brooks did not in his testimony suggest that he had even demanded or even asked that a KAS employee not return. In fact, it is clear that Mr. Arauz Sr. did tell KAS that an employee was not permitted back and it complied. There was no suggestion that employees went to work for another KAS client, and this seems unlikely given that KAS did not really have full scale office in the area.

85. On the other hand, the evidence is that KAS decided on its own that employees were not working out and told them not to return.

86. Therefore, I am satisfied that as a practical matter both KAS and Metro had the authority to discharge an employee.

The Party Hiring Employees

87. I have already discussed the initial hiring which was done by KAS alone.

88. Following the opening of the facility KAS hires most of the employees on its own without input from Metro. There are exceptions. Sometimes, individuals will leave their resume at the plant and Mr. Arauz Sr. may review the resumes and casually comment on them ("this guy looks good") as they are passed to KAS. KAS leaves business cards at Metro's reception so that they can be given to people who come looking for work.

89. Metro does participate in a significant way in the hiring of certain specialized employees like maintenance employees. This is because, as Mr. Arauz Sr. testified, he "needs someone to take care of the equipment". KAS defers to Metro about the technical aspects of the maintenance position. KAS brought maintenance employee candidates for Metro to interview and decide on. So, for example, Ms. Spence sent Arauz Sr. an e-mail which attached an individual's resume and said:

> This guy looks promising. I just spoke with him and he seems to have all the qualifications you are looking for, including experience as a "Maintenance Manager".

In addition, a maintenance candidate was referred by Metro's British Columbia operation.

90. Another example is that Mr. Arauz Jr., Mr. Arauz Sr.'s son, was hired after he came to Mr. Arauz Sr. who referred him to KAS.

91. This factor is mixed but favours KAS. There is joint decision-making/Metro involvement on some hiring but KAS hires the vas majority of employees.

Decision

92. In my view a critical point in this case, both for determining the "true" employer and for assessing the related employer application, is asserting the degree to which Metro exercises control over the employees. In this, it is important to keep in mind that KAS lead hands are bargaining unit employees. Any directives given by Mr. Arauz Sr. to them are directives to the bargaining unit directly.

93. In a recent decision regarding an employment agency and client, *PPG Canada Inc.*, [2009] OLRB Rep. Mar/April 256 (March 27, 2009), I made the following comment regarding the subject of control which has direct application in this case:

> 105. Liberty and PPG would like the Board to find that the associates work in a kind of metaphorical box, separated from PPG's business. While this may have been the goal, reality is different. In real life, particularly in a long standing relationship like this one, PPG managers direct the associates at

> least occasionally. More importantly PPG's instructions to associates are passed to them through the conduit of Liberty's supervisors.

94. The responding parties in this case make much the same kind of argument as did *PPG* and Liberty. They assert that they are separate companies who carry on business separately; that the KAS employees have little interaction with Metro employees (particularly Mr. Arauz Sr.); and the KAS employees operate largely independently or under the direction of KAS lead hands and Mr. Khan and Ms. Spence. Those instances where the "metaphorical box" was pierced are said to be "exceptions that prove the rule". Or, to use the word Mr. Arauz Sr. used in his evidence, "mistakes".

95. At first glance the position of the two corporations strains credibility. The idea that Metro, through Jorge Arauz Sr., would ignore the KAS employees or just look at the sorting equipment without considering what the employees were doing appears absurd. On its face, the position of the corporations is not enhanced by the fact that KAS has no full-time on-site supervisor. However, the Board must make its decision on the evidence before it, and not on what makes logical sense given the Board's labour relations experience.

96. Regrettably, in considering the evidence actually presented, I have misgivings about the testimony of some of the witnesses called by KAS. In my view, these witnesses were very much aware of their employer's theory of the case and gave evidence in a way which flirted with deliberate untruths. There were numerous instances where witnesses made categorical statements about a particular state of affairs in examination in chief, where in cross examination it became apparent that the truth was not nearly so categorical. For example, it was suggested that Metro did not have the authority to tell KAS to remove an employee from the workplace. Apart from the fact this claim is difficult to understand, there was at least one instance where Metro made such a demand.

97. As another example, Mr. Brooks' and Mr. Arauz Sr.'s evidence is that KAS is just one of the many "outside" contractors who perform work on site. However, there was no evidence that Metro was involved in any fashion with respect to the employees of other contractors other than KAS. For example, during the investigation of a sexual harassment complaint made against a KAS employee by the employee of a truck company who dropped material at the site, Arauz Sr. participated in the interview of the KAS employee but did not have contact at all with the complainant. It is obvious that for a number of reasons KAS is not "just another contractor". Because of these issues, I have put more stock in the concrete evidence about what actually occurred – where there are concrete examples rather than in the evidence given.

98. In considering whether the "metaphorical box" was breached it is important to be cognizant of the short period of time which is under examination. The plant opened on January 21, 2008 and the application for certification was filed June 2, 2008. So the period at issue is only approximately four months. During the brief period in question there were actually several problems with employees. It is striking how many "mistakes" (if Mr. Arauz Sr.'s evidence is to be believed) were made during that four month period. These "mistakes" included telling KAS how many employees were permitted to book a day off to disciplining employees directly. Moreover, it is also striking how little evidence there was of lead hands playing a role in any of the number of events which took place at the plant. Virtually every serious employee issue was raised by Mr. Arauz Sr.

99. Even where the problem was not a disciplinary issue, there was at least one instance where Mr. Arauz Sr. called Mr. Khan or Ms. Spence and said that an employee has not been working out.

On March 10, 2008, the log book states: "Jorge from Metro called. He wants Dave King to go back as a sorter. Not working out too good. I will speak to Dave today". I also note that this kind of evidence is difficult to reconcile with the employers' theory of the case.

100. There is no doubt that much of the routine employee matters were dealt with by KAS. However, even at that, there are instances where employees either told Mr. Arauz Sr. directly about an absence or were advised by Ms. Spence or Mr. Khan to tell Mr. Arauz Sr.

101. On the other hand lead hands also did speak to Ms. Spence or Mr. Khan about employees who were not performing adequately.

102. In *PPG, supra*, I stated:

> 96. It is not at all clear whether PPG or Liberty is the "true" employer of the employees. The various employer *indicia* are shared. However, for the reasons stated below, it is not necessary to make a finding on this issue. It was because of situations like this that the Legislature put s. 1(4) into the Act and that is where I turn to next.
>
> 97. The Board is concerned that a question which should be relatively straightforward – who is the employer – can, because of the complex relationships which employers enter into, be so difficult to resolve. This is a concern, not because these hearings occupy a considerable amount of Board resources. It is because the Act contains a tool – s. 1(4) – which appears to eliminate the necessity of disentangling the identity of the "true" employer especially on an application for certification. S. 1(4) makes it clear that in certain circumstances there may be two or more entities which employ an employee.

103. In my view the same type of conclusion applies in this case. It is difficult in this case for the Board to determine the "true" employer or for that matter whether there even is a single "true" employer at all. Power and day to day authority over employees are shared in this case to a significant degree. This is the kind of circumstance which s. 1(4) of the Act is designed to address.

104. In *PPG* I discussed the principles applicable to a s. 1(4) application as follows:

> 98. Section 1(4) of the Act states:
>
> > **1.** (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
>
> 99. The starting point in any application under s. 1(4) is a determination of whether the conditions for such a declaration have been met. Those

conditions are: (i) two or more entities (ii) under common control or direction; and (iii) in associated or related activities or businesses. In this case, there are clearly more than two entities, so the controversy is whether associates are employed in associated or related activities and whether they are under common control and/or direction.

100. There is no claim that Liberty, PPG and/or TSE are under common control or direction or engaged in associated or related business broadly speaking. PPG is an auto glass company; Liberty is a labour supply agency. They do not share directors, shareholders or officers. While Liberty is a "member" of TSE's organization, which allows it to use its proprietary tools, and gives it access to certain human resources expertise, they are not really related in a corporate sense.

101. However, that is not the end of the matter. The Board's jurisprudence is clear that such a direct corporate relationship as common ownership is not necessary for the application of s. 1(4). Two companies can be found to be a single employer because of what they do at a single work location. In *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, the Board discussed the justification for this conclusion this way:

> 93. The effect of treating two or more legal entities as a single employer for the purposes of the *Labour Relations Act* is that they then jointly exercise the rights and jointly and severally bear the obligations of an employer under that Act and any applicable collective agreement with respect to a given bargaining unit of employees and their trade union bargaining agent. Subsection 1(4) requires that there be some connection between the entities before the Board may treat them as one. The required connection is defined in very general terms; there must be "associated or related activities or businesses" carried on by two or more entities "under common control or direction." Obviously, the connection contemplated by these phrases is not limited to relationships of the sort that would be characterized at common law as a "partnership" (a legal characterization which, like "employment", does not depend for its application on the willingness of the parties to the subject relationship to so describe it), since partners are jointly and severally liable at common law for all obligations incurred by any one of them in respect of the partnership business. No special power to do so is needed in order to treat partners as effectively constituting one employer under the *Labour Relations Act* with respect to persons employed in the partnership business. More generally, it is clear that the "common direction and control" on which subsection 1(4) focuses is direction and control over businesses or activities, which may include control over employees but need not require it and should not, therefore, be confused with or limited to the control tests which would be applied in determining which of two respondents was the employer of particular employees at common.
>
> 94. Another conclusion which can be drawn from the language chosen by the Legislature is that it did not intend the discretion to treat respondents as one employer to arise only where the connection between them is a relationship by blood, marriage, degrees or corporate ownership or a combination of these. Definitions with that limited

> perspective were and are quite common in taxation statutes, including the *Corporations Tax Act* in force in Ontario at the time subsection 1(4) was enacted. The Legislature's avoidance of the language of taxation statutes or any other form of words with well-settled meaning must be treated as deliberate. It is apparent the Legislature thought it either impossible or unwise to define in advance any precise limit to the circumstances in which a discretion of this sort should arise, and preferred that the Board work this out on a case by case basis. This is particularly apparent from the use of the phrase "in the opinion of the Board," which makes it clear that it is from the Board's perspective as an administrative tribunal with expertise in labour relations that the meaning of such phrases as "associated or related activities or businesses" and "common control or direction" is to be assessed.

105. In my view this analysis is equally applicable to the facts of this case.

106. With respect to s. 1(4) there are clearly two or more business entities and, at the Durham facility, they are engaged in associated or related businesses in the same way as *PPG* and its employee agency Liberty. That leaves the question of common control or direction. There is no doubt that KAS and Metro are not "partners" and that their interests do not always align precisely. However, there are numerous examples in the evidence of joint decision-making between KAS and Metro regarding the KAS employees:

- discussion about hiring specialized employees;
- joint decisions on wages;
- joint interview of people in the harassment issue;
- joint discipline of an employee for running the line empty;
- joint participation in a range of health and safety issues including the joint health and safety committee;
- joint direction of employees – Mr. Arauz Sr. tells line employees what to do both directly and by conveying that information to bargaining unit lead hands;
- joint training on the opening of the facility;
- discussions about discipline issues.

107. In addition, KAS employees use Metro's lunchroom without compensation and Metro provides the employees with safety equipment without compensation.

108. It is also important that Metro is contracting out its core function at the Whitby facility. In this regard, the circumstances before the Board are quite similar to those in *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931. In that case the Board determined, among other things, a s. 1(4) application where a nursing home laid off its unionized workforce and contracted with a health care sector personnel supply agency to provide its entire workforce, including a single on-site supervisor. A majority of the Board found that *Kennedy Lodge* was the "true" employer and that it and the labour supply company (Medox) were related employers as follows:

> 56. In contrast to the two cases referred to above, the activities with which we are concerned in this case form part of the core activity of Kennedy Lodge. It is one thing to contract out the performance of

> peripheral activities (a hospitality suite where brewing is the core activity or the washing and rustproofing of automobiles where the selling of cars is the core activity) over which fundamental control can be easily relinquished, as it was in those cases. It is much more difficult to relinquish fundamental control over the core activities of the business. If we are somehow mistaken in our conclusion that Kennedy Lodge retained fundamental control over the nursing activities carried out by the aides, then, at the very least, the evidence establishes that Kennedy Lodge and Medox share control over these activities, as they are carried on as part of Kennedy Lodge's business. The contract between Kennedy and Medox contemplates that there will be a significant degree of common control and direction, between Kennedy and Medox and the conditions laid down in the regulations to the *Nursing Home Act* leave no doubt that the activity of Medox in supplying nursing aides to Kennedy Lodge and the activity of Kennedy Lodge in providing nursing care for its residents are related activities within the meaning of section 1(4) of the Act and are under common control within the meaning of the same section.

109. Here, the KAS associates are fully integrated into Metro's business in Whitby and they are an integral part of that business. There are generally no KAS supervisors on site. When no KAS supervisor is on site, the evidence demonstrates Ms. Arauz Sr. plays a heightened role in ensuring employees are acting and working properly. Mr. Arauz Sr. also plays a more general role in ensuring that KAS policies – like the time off policy – meets his requirements. Moreover, the KAS employees are not "temporary" employees in any sense of that word. When two employers are normally independent but are functionally and economically integrated, even at one location, the essential community of interest between them of the employees employed by one or both often may make it appropriate to treat them as a single employer. In my opinion KAS and Metro operate associated or related businesses and are under common control and direction. This is fact despite the contractual arrangement between the two companies.

110. For the reasons expressed above and as set out in the *PPG* decision, I am therefore satisfied that KAS and Metro exercise common control and direction at the Whitby facility.

111. KAS makes a serious argument that the *PPG* decision is overly broad and would collapse all subcontracting relationships. This is deserving of the Board's consideration. In order to deal with this argument it is important to appreciate how subcontracting is dealt with in labour relations.

112. What is a subcontracting? Subcontracting occurs when a business grants a contract to another company to do something. In labour relations we sometimes speak of a legitimate "subcontracting". A legitimate subcontract in labour relations is one where the fundamental control over the employees rests with the subcontractor. Some of the considerations which bear on an assessment of the sub-contracting's "legitimacy" are:

> i) the extent to which the contracting business is in a genuine arms-length relationships with the contractor;
>
> ii) the extent to which the contractor devolves control over the subcontracted: the more the contractor retains control the less like a true subcontracting it appears;

iii) whether the subcontracted work represents a core business of the contractor or is just a periphery matter;

iv) in labour subcontracting, the extent to which it is a permanent or a temporary subcontract.

113. Under this analysis, the Board's *PPG* decision would not collapse all subcontracting relationships, just the ones that lack legitimacy. In *PPG,* where the relationship was arms length, the contractor had devolved substantial control to the client (PPG), the work at issue represented PPG's core business and it was a relatively permanent subcontracting. Those are circumstances which are very similar to those existing at Metro.

114. The kinds of arguments made by KAS were also dealt with in *PPG*:

> 108. PPG and Liberty also rely on the Board's resistance to making a single employer declaration under s. 1(4) where, as here, the two entities at issue are in a genuine sub-contracting relationship. An instance which demonstrates the Board's case law on this point is *Ainsworth Electric Co. Limited,* [1993] OLRB Rep. Sept. 817 where the Board stated:
>
>> 37. In our opinion, the situation here is essentially that of owner – sub-contractor, not a joint venture; and while there may well be sub-contracting arrangements which can attract the application of section 1(4), we are not persuaded that this is one of them. The situation here is similar to that in cases such as *Charming Hostess Inc.,* [1982] OLRB Rep. April 536, *Ethyl Canada Inc.,* [1982] OLRB Rep. July 998 or *Federated Building Maintenance Company Limited,* [1985] OLRB Rep. November 1584, where the Board refused to collapse a sub-contracting arrangement merely because "work" which might have been done by the employees of a sub-contractor was now being done by an owner. The fact that an owner may choose to have certain work done by its own forces, or to have some or all of it done by a sub-contractor, does not provide the basis for a section 1(4) declaration or an extension of bargaining rights to the employees of such owner (be it a chemical manufacturer as in *Ethyl,* a beer manufacturer as in *Charming Hostess Inc.,* an automobile manufacturer, or, as here, a company running an entertainment complex).
>
> 109. However, the jurisprudence also recognizes that merely declaring a relationship to be one of subcontractor/contractor does not create a shield against the application of s. 1(4). There is a good discussion of this point along with a description of the circumstances where a s. 1(4) might issue against a contractor and subcontractor in *Federated Building Maintenance Company Limited,* [1985] OLRB Rep. Nov. 1585:
>
>> 32. We accept the union's proposition that section 1(4) may be broad enough to cover some subcontracting arrangements – especially those which do not involve "contracting out" but which might more appropriate be described as "contracting in" or "labour only" subcontracting. Where "A' enters into a relationship with "B", whereby "B" comes into "A's" premises to perform functions with respect to "A's" own employees, there will inevitably be something of

> > a "symbiotic relationship" between the two business entities. Their activities will be complementary. They will necessarily be "related" in a general sense, and efficiency will usually require that there be some degree of co-ordination. Moreover, the more closely the purchaser of employee services controls when, where, how, by whom, and at what price the employee services are provided, the more the activities will appear to be under *joint control or direction*. If at the same time, the subcontractor is effectively dominated by the purchaser or it appears that the notion of a subcontract was introduced to provide a separate non-union corporate vehicle which permits the purchaser to have the same work performed in much the same way as before, but beyond the ambit of its collective agreement, the Board may well find that a section 1(4) declaration is warranted.
> >
> > 33. Section 1(4) permits the institutional rights of a trade union and the contractual rights of its members to attach to a definable commercial activity regardless of the particular legal vehicles through which that activity is carried on. Legal form or changes in form will not necessarily dictate, fragment, or undermine a collective bargaining structure. Two firms – quite separate in law – can be treated as one employer for collective bargaining purposes, and the union need not persue the often difficult question of who would be "the real employer" applying common law tests. Moreover, if a particular commercial relationship falls within the ambit of the language of section 1(4) and the facts establish the mischief which section 1(4) was designed to avoid, it does not avail respondents to claim that they are separate companies with merely a "subcontracting" relationship. There is no magic in terminology. On the other hand, while many subcontracting arrangements might arguably fall within a literal reading of the language of section 1(4), we do not think the statute was ever intended to collapse the vast majority of *bona fide* subcontracting relationships. Section 1(4) is clearly discretionary, and should be applied only where there is clear evidence of the mischief it was intended to avoid.
>
> 110. The kind of subcontracting circumstances which the Board in the *Federated* case said might lead to a s. 1(4) declaration are largely present here. That is, PPG contracts in the Liberty associates and pays for the supervisors and on-site representatives and there is clearly a symbiotic relationship between Liberty and PPG. Of course what is missing is that Liberty is not dominated by PPG (except, on the evidence, perhaps at the facility) and the arrangement between Liberty and PPG is not designed to avoid a UFCW collective agreement.

115. Again, that analysis is applicable to Metro and KAS.

116. The final issue in this case is whether the Board should exercise its discretion to declare KAS and Metro to be a single employer. Again, *PPG* is directly relevant and the analysis and conclusions are directly applicable. I dealt with this issue in *PPG, supra*, as follows:

> 113. Once the Board finds that the three pre-conditions for the making of a single employer declaration are present that is not the end of the matter. The Board still has discretion to make a single employer declaration or not. In

this case PPG, Liberty and TSE argue that even if all of the pre-conditions are met there is no labour relations purpose to making a declaration. They rely on what the Board has often stated is the purpose behind s. 1(4) of the Act. That purpose is discussed in the oft-cited decision in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945:

> Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an application to rely on both.

PPG, Liberty and TSE also rely on the Board's decision in *Carpenters and Allied Workers Local 27 v. Toronto (City) and Toronto Parking Authority* [2000] O.L.R.D. No. 1687:

> 19. In this case, the Board finds that even if the legal and factual foundation for a section 1(4) declaration was made out, it would not exercise its discretion and declare the TPA and Toronto to be a single employer for the purposes of the Act. The reasons are quite simple; this case does not disclose any of the "mischief" which section 1(4) was intended to remedy. At its most basic, section 1(4) is in place to ensure there will be no erosion of bargaining rights caused by a unionized entity spinning off a new company, moving work or opportunities for growth from the old company, and operating the new company without regard to the collective agreement obligations of the old. The mischief in such an arrangement is obvious and this labour relations "sleight of hand" is remedied by the Board's discretion to make both companies a single employer for the purposes of the Act.

114. Of course the reason there is no avoidance of a collective agreement or bargaining rights in this case is that there is no collective agreement or bargaining rights to avoid. And that is one of the facts which makes this case somewhat unusual. It is not at all clear that the same principles which govern when a union already has bargaining rights apply when a union is applying for the first time for certification with respect to a group of employees. Although these situations have not arisen frequently, it appears that the Board has identified other somewhat different purposes for s. 1(4) as

> additionally relevant during certification proceedings. In *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029 the Board stated:
>
> > Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in term of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.
> >
> > Prior to the enactment of Section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.
>
> 115. In addition, there seems to be good reason to make a single employer declaration in recognition of the reality of the workplace. One of these realities is that it is difficult for anyone – employee, union or the Board, to determine who the "true" employer is.
>
> 116. Another reality is that if the union is certified for just PPG or just Liberty its bargaining rights are substantially diminished. Bargaining with either one of them alone would be enormously difficult. Power over the employee is shared between PPG and Liberty. Neither has the unfettered right to raise wages. It only makes sense that they be treated as a single employer rather than splitting them in a way which undermines the bargaining rights at the time the union is certified.
>
> 117. Based on the evidence, it is apparent that both Liberty and PPG (at least) need to be certified for the union's bargaining rights to have real meaning. I am satisfied that both companies need to be at the bargaining table and both need to be available to the union to be dealt with on a day-to-day basis. Both companies essentially enjoy supremacy over the employees in particular areas. Certifying only one of them would mean that the union could not deal with the party having supremacy in other areas. These concerns are not merely speculative. If only Liberty were certified as Liberty and PPG desire, one only need to look at their response to the organizing campaign to see that the union would be at a serious labour relations disadvantage in dealing with only Liberty. Moreover, PPG has supremacy in areas – such as wages, health and safety and work procedures which would render the certification of only Liberty very problematic.
>
> 118. I am satisfied, therefore, that it is appropriate to exercise my discretion to make a s. 1(4) declaration *vis a vis* PPG and Liberty. The Board finds and declares Liberty and PPG are a single employer for the purposes of the Act with respect to this bargaining unit.

117. For all of the foregoing reasons and pursuant to section 1(4) of the Act, I find and declare that KAS and Metro are a single employer.

118. The Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all employees of Metro Municipal Recycling Services Inc. and the K.A.S. Group of Companies Inc. working at 4590 Garrard Road in Whitby, Ontario, save and except Plant Manager, supervisor, those above the rank of supervisor, office, clerical and sales staff.

119. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

120. A certificate will issue to the applicant.

121. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

122. Meeting and hearing dates set previously are hereby cancelled.

123. The application in Board File No. 0811-08-U has been withdrawn.

124. The responding party is directed to post copies of this decision immediately, in a conspicuous location(s) where it is likely to come to the attention of the employees affected by this application. These copies must remain posted for a period of thirty (30) days.

2539-06-R United Brotherhood of Carpenters and Joiners of America, Local 2486, Applicant v. **Pedersen Construction Inc.**, Responding Party

Certification – Construction Industry – Employee Status – Membership Evidence – Representation Vote – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental mis-representation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although

they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

BEFORE: *Mark J. Lewis*, Vice-Chair

APPEARANCES: *Melissa Kronick* and *Gabriel Parent* appearing for the applicant; *Michael S. Ruddy, Alec Pedersen* and *Karl Pedersen* appearing for the responding party.

DECISION OF THE BOARD: December 30, 2009

1. As set out in the Board's previous decisions concerning this matter, this is an application for certification under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") which the applicant elected to have dealt with pursuant to the provisions of section 128.1 of the Act. This application relates to carpenters and carpenters' apprentices that were at work on two job sites in north-eastern Ontario (one in Haileybury and one in Englehart) , for the responding party, on November 15, 2006.

2. Following a number of previous decision of the Board, and numerous days of hearing, the issues which remain to be decided in this application relate to employee status and the reliability of the applicant's (the "Union's") membership evidence. Specifically, this latter issue called into question the percentage of bargaining unit employees that the Board should find to be members of the Union given the responding party's ("Pedersen's") allegations relating to section 128.1(5) and, if necessary, whether the Board should exercise its discretion under section 128.1(13)(b) and order a representation vote even if the Board finds that more than fifty-five per cent of the employees in the bargaining unit were members of the Union as of the date of application.

EMPLOYEE STATUS

Charles Lachapelle

3. Pedersen asserts that Charles Lachapelle was an employee who was at work in the bargaining unit on the date of application, November 15, 2006. The Union challenged Mr. Lachapelle on the basis that he was not performing bargaining unit work on the date of application and that he is excluded from the bargaining unit pursuant to section 1(3)(b) of the Act as he is a managerial employee.

4. Despite some initial confusion concerning what job site(s) he may have been on on November 15th, ultimately it was not disputed that Mr. Lachapelle was at work on Pedersen's Temiskaming Shores New City Hall job site in Haileybury on the date of application. Pedersen's work on the New City Hall project consisted of concrete forming that it was performing pursuant to its subcontract with the general contractor for this project, Cy Rheault Construction. Mr. Lachapelle ran Pedersen's concrete forming crew on this job site.

5. Pedersen's work on the New City Hall Project, including on the date of application, was fairly standard in that it involved constructing concrete walls and footings, using a forming system known by the commercial name of *Advanced Forms*. On November 15th there were six Pedersen employees (including Mr. Lachapelle) working on this site. The parties have agreed that the other five employees are all employees in the bargaining unit for the purposes of this application. Therefore, I must assume that both parties have accepted that those five men were all performing bargaining unit (carpenters') work for the majority of their work day on November 15th.

6. Mr. Lachapelle's evidence, generally supported by the testimony of the other five members of the crew, was that on the date of application he spent the majority of his work day (he estimated some 5 to 6 hours) stripping, moving, placing, setting-up and constructing forms for both footings and walls. He also claimed that at the beginning of the day he had done some lay-out work and that he had also been involved in pouring concrete in the afternoon. The only real evidence offered by the Union to counter Mr. Lachapelle's testimony was that given by its Business Representative/Organizer, Gabriel Parent. Mr. Parent's evidence in this respect was that he did not see Mr. Lachapelle doing any carpenters' work during the relatively brief period that he was on the site on November 15th and that Mr. Lachapelle told him (Mr. Parent) that he rarely did such work.

7. Given the evidence which I heard, I find on the balance of probabilities that Charles Lachapelle spent the majority of his work day on the date of application performing carpenters' work. As all of the evidence disclosed, a six man concrete forming crew is simply too small to *carry* a non-working foreman and, even Mr. Parent acknowledged, Mr. Lachapelle was wearing a carpenter's tool belt when he saw him on the New City Hall site that day. Further, and as outlined in greater detail below, although the members of concrete forming crews are regularly required to perform the work of a number of different trades, Mr. Lachapelle was the most senior and most experienced employee on a crew with respect to which the parties have agreed that all of the other members performed carpenters' work for the majority of the day on November 15th. Therefore, to the extent that the work of other trades (most notably labourers' work) was performed, and, in the absence of any specific evidence to the contrary, the only logical inference is that Mr. Lachapelle would have been performing the most difficult and more skilled aspects of concrete forming work, including doing the lay out for the forms, which is generally carpenters' work, as opposed to performing the less skilled, but more physically demanding aspects of such work, which is generally labourers' work and which was likely more often done by the more junior members of Mr. Lachapelle's crew.

8. As noted above, the Union also took the position that Mr. Lachapelle was a managerial employee.

9. Mr. Lachapelle has worked for Pedersen for over thirty years and is therefore one of its most senior and most trusted employees. It was also not disputed that he currently receives a salary, as opposed to being paid by the hour as is the case with most of the company's construction employees. However, there was ultimately no evidence on which to conclude that Mr. Lachapelle is anything other than a working foreman, albeit a very experienced and highly valued one. He looks after and runs jobs for Pedersen and, in November 2006, he was in charge of the crew on the New City Hall job site. In this respect, he assigned particular tasks to the members of his crew, monitored the progress of the work and reported back, primarily to Alec Pedersen, concerning the job/men he was looking after. From time to time, he was also asked to verify employees' hours. However, there was simply no evidence establishing that he has the power to hire, fire or discipline employees or even the power of effective recommendation concerning these matters. There was also no evidence

to establish that Mr. Lachapelle has any role in assigning particular employees to particular projects; in determining who is to be laid off and rehired and when; and, in determining rates of pay or in setting the work hours and/or authorizing time off and vacations, even for the men on his own crew. Therefore, there is simply no basis for finding that he is a managerial employee pursuant to section 1(3)(b) of the Act.

10. For all of the reasons set out above, I find Charles Lachapelle to be an employee in the bargaining unit for the purposes of this application.

The Englehart Job Site

11. On November 15th, in addition to the job sites that the Union was aware of, there was one active job site that the Union had no knowledge of. Specifically, on the date of application Pedersen was performing the concrete forming of footings and walls on a job site in Englehart, Ontario, pursuant to its subcontract with Grenfell Contracting Ltd. The project involved building an addition to the ambulance service bay for the Englehart Hospital and, since the work on this project was clearly within the industrial, commercial and institutional sector of the construction industry, any carpenters that were at work on this site on the date of application would fall within the relevant bargaining unit.

12. Pedersen asserts that the following six employees were at work, performing bargaining unit work, on the Englehart job site on the date of application:

Eric Gaboury
Luc Ladouceur
Ed MacKewn
Curtis McBride
Jean Paul Parent
Oscar Vinette

13. The union asserts that none of these six men performed carpentry work for the majority of their work day on November 15th.

14. All six of the above noted individuals, along with Alec Pedersen, gave evidence concerning the work which was performed on the Englehart project on and about November 15th.

15. Based on the evidence which was called, including documentary evidence which consisted of scheduling lists, timecards and payroll records, there is no doubt that all six of the challenged employees were at work, for Pedersen, at the Englehart site on the date of application. The only real issue to be determined is should they be found to be employees in the bargaining unit, namely carpenters.

16. As both parties agreed, the Board determines employee status in construction industry applications for certification using a three pronged analysis which is colloquially known as the *Gilvesy test*. Specifically, in *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 the Board stated:

> 21. In making our determination, we considered the work performed by the persons whose status was in dispute in these proceedings both on the date

> of application and during a period prior to that date. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he performed during any previous period. Further, the use of a "representative period" has tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create, as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:
>
> (a) whether the person was employed by the respondent and at work on the date of the application; and
> (b) if so, the work that that person spent the majority of his time doing on that date of application; or
> (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

17. As noted above there is no dispute concerning the first of these three criteria in that all of these six men were employed by Pedersen and were at work on November 15th. Accordingly, the focus then shifts to the actual work that each man did on this date and whether any of them spent the majority of their time doing carpenters' work on November 15th. However, in the specific circumstances of this matter, reaching definitive conclusions concerning these questions is extremely problematic.

18. As noted above, the Union was not aware of the Englehart project until after Pedersen had filed its response. Therefore, the Union was not able to call any first hand evidence as to who had done what work, and for how long, on the date of application. Further, and in large part because of the Union's total lack of contact with this site (and the employees working on it) the members of Pedersen's concrete forming crew at the Eglehart project were completely unaware that there was anything *significant* or *special* about November 15th until after they found out that the application had been filed, which was a number of days later. Accordingly, by the time anyone realized that it might be important to establish exactly what these employees had actual done on November 15th a critical period of time had already passed and memories had begun to fade. This problem concerning accurate evidence with respect to who actually did what work on the date of application is made even more severe in this case owing to the general nature of the work that the employees were doing and the work methods they utilized.

19. These employees made-up a concrete forming crew and everyday that they worked at this site they were all performing at least some of the normal aspects of concrete forming work. However, such work involves tasks which fall within the core work jurisdiction of a number of different trades. Specifically, carpenters, labourers, iron workers (rodmen) and operating engineers are all regularly involved in concrete forming work. Further, various tasks connected to concrete forming fall within the jurisdiction of more that one trade. For example, both labourers and carpenters move, place and strip forms depending on the circumstances.

20. In forming the walls at least, Pedersen was using Advanced Forms at the Englehart project. This is essentially a forming system which utilizes pre-made panels rather than building the forms on site out of loose materials. Very simply, with this system panels are brought to the site in cages, each of which contains a number of panels of differing sizes. These cages are placed throughout the general area where the forms are to be built, including in excavated trenches if they are wide enough. Thereafter, the panels are carried to the exact location where they are needed (having first been cleaned and/or oiled, if necessary) at which time they are erected and held in position by a series of clamps and tie rods, in order to make the form for a particular section of wall. Eventually, after a number of additional steps (including building bulkheads inside the form and placing rebar, if necessary), concrete is poured into the form. After the concrete has hardened for approximately a day, the form is stripped and the panels are cleaned and oiled and moved to the next section of the wall to be poured where the process of using the panels to build the form starts all over again.

21. One important feature of forming systems such as Advanced Forms is that they are specifically designed to make concrete forming work much easier to perform. In essence such systems have introduced elements of mass production into the construction industry and have decreased (or at the very least altered) the level of skill which is required in order to build forms. Further, such systems are specifically designed to be used by, and therefore encourage the use of, a crew of workers having interchangeable, and multi-trade, skills. Certain tasks, such as doing the lay-out or setting the first panels (usually involving a corner) in place, may require more skill than other tasks, such as carrying freshly stripped panels to a new location further down the trench, but concrete forming crews using such forming systems are at their most efficient when as many members of the crew can do as many of the required tasks as possible regardless of what trade jurisdiction(s) such tasks might fall into. Given this, and based on the evidence which was called in this case, it is apparent that the six members of Pedersen's crew who were at work on the Englehart Hospital on November 15th were all capable of performing, and often did perform, the work of a number of trades in carrying out their regular concrete forming work, including carpenters' work.

22. As noted above, all of the six men that worked on the Englehart jobsite on the date of application gave evidence in this matter. I am convinced that all six of them gave accurate and reliable testimony concerning their normal work functions and what they generally did on this job site, and on other sites, in their work for Pedersen. Based on their evidence, it is clear that on the Englehart job site, on November 15th, lay-out work was done, forms for footing were both built and stripped, panels were moved about the site (using the backhoe along with being carried by hand), rebar was placed, forms for the walls were built using the panels and concrete was poured. Certainly some of this work, the lay-out for the footings and building the forms for example, is carpenters' work. However, I am also convinced that none of these six men could remember with any degree of precision exactly what they did, and in particular and for how long, on the date of application.

23. This lack of precision concerning exactly who did what is hardly surprising, and is certainly not meant to suggest that the witnesses were not all trying their best to accurately recall past events when they testified, which, in some cases, was more than a year after the application date. From the perspective of this crew, November 15th was a day, like any number of other days, when they were engaged in doing what ever combination of tasks needed to get done in order to construct the footings and the walls for the ambulance service bay extension. Further, the Advanced Forms system is specifically designed to breakdown jurisdictional distinctions between trades and virtually guarantees that crew members will repeatedly perform the work of different trades throughout the work day. Accordingly, I find that, while all six of these men did some carpenters' work on November 15th, there is not sufficient evidence to determine conclusively, on the balance of probabilities, which, if any of them, spent the majority of their time performing such work on the date of application. In fact, in this case, there is insufficient conclusive evidence to determine exactly what trades' work (if any) each one of these men performed for the majority of the day, and thus, what bargaining unit they would fall into, on the date of application as a result of the work they performed on November 15th.

24. Accordingly, in this case I find it appropriate to resort to the third prong of the *Gilvesy Test* in determining whether any of these six men fall with the bargaining unit applied for and in this respect I further find the overall and general requirements relating to the composition of a concrete forming crew to be not only a relevant, but in fact the determining, factor in assessing their status. As noted above, although the individual members of a concrete forming crew perform the work of various trades, the crew as a whole must include individuals that are capable of performing the more skilled aspects of the work, normally associated with carpenters, while at the same time having employees that, while required to do certain carpenters' tasks, are primarily used to do the less skilled work of labourers. Further, each crew requires at least one person who is capable of operating a backhoe (or other similar equipment) in order to excavate the trenches (if required) and to move the cages around the site. When the members of Pedersen's Englehart crew are analysed on the basis on the overall compositional requirements of the crew, it is relatively easy to determine which of them should be considered carpenters, and which should not.

25. Oscar Vinette was the only one of these six men who operated the backhoe on this site. On the date of application itself, the backhoe was used for excavating, spreading gravel and moving the cages around the site. Without Mr. Vinette operating this piece of equipment to do these tasks the work on the site could not have continued. Therefore, while Mr. Vinette clearly did some labourers' and carpenters' work on the date of application his ability to do the work of these two trades was certainly not the primary reason for him being on the crew on that day, and accordingly, I find that he was an operating engineer, and not a carpenter, on the date of application.

26. Both Eric Gaboury and Curtis McBride had relatively little experience in the construction industry, certainly compared to other members of the crew, as of the date of application. Further, at $17.50 per hour, they were the lowest paid employees on this site which is an indicia of their limited skills. Certainly there was no evidence that, as of the date of application, either man had acquired any particular specialized carpentry skills, although there was evidence that Mr. Gaboury was training to be a cement finisher. Accordingly, I find that the primary role on the crew of both of these men, on the date of application, was as labourers, not carpenters, and therefore I find that they are not employees in the bargaining unit for the purposes of this application.

27. J. P. Parent was the crew leader and working foreman. He was the most experienced and highest paid employee on the site. The evidence made clear that whenever skilled work, such as doing the lay-out, had to be done, he was generally involved. Accordingly, I find him to be a carpenter, and therefore an employee in the bargaining unit, on the date of application.

28. Both Ed MacKewn and Luc Ladouceur had considerable experience in the construction industry, although neither one had any formal training to be a carpenter. Further, both men, although paid less than Mr. Parent, were paid substantially better than Messrs. Gaboury and McBride. While in the case of Mr. MacKewn this large pay differential could potentially have resulted from the fact that he had worked for Pedersen for twelve years this explanation could not apply to Mr. Ladouceur who had only been hired the month before. Accordingly, I draw the logical inference that both of these men were paid more because they were more skilled and more was expected of them. Therefore, I find that, on the balance of probabilities, the primary role of these two men on the crew involved the performance of more skilled aspects of concrete forming work and as such I find them to be carpenters as of the date of application and therefore employees within the bargaining unit.

THE UNION'S MEMBERSHIP EVIDENCE

29. All of the membership evidence relied upon by the Union in this application was collected at the New City Hall job site in somewhat unique circumstances. In view of these circumstances, the statements made to the Board by employees working on this job site and the allegations and arguments which Pedersen raised concerning the Union's membership evidence, it became necessary during the course of the hearing, and is necessary in this decision, to disclose which employees signed applications for membership in the Union. This disclosure is unfortunate but, in this case, it cannot be avoided.

30. As noted above, the general contractor for the New City Hall project was Cy Rheault Construction, a company that is bound to the Union's Provincial ICI Collective Agreement. Accordingly, all of the carpenters working on the site should have been members of the Union (whether as direct employees of Cy Rheault or as employees of unionized subcontractors). However, in the Fall of 2006 the Union was apparently unable to supply Cy Rheault with enough carpenters in order to perform the work on this project. Mr. Parent's evidence was that this inability to supply enough men had resulted in the Union authorizing Cy Rheault to hire carpenters to work on this project who were not members of the Union and who the Union would *permit*. Permitting is a practice which is provided for under the Collective Agreement and which allows for persons who are not union members to be hired and to begin working, but which generally requires them to join the union if they remain working for longer than a set period of time. Mr. Parent understood that the Union had agreed that up to four non-union carpenters would be issued with permits to be hired for work on this site. For whatever reason this is not what Cy Rheault did. Instead it subcontracted the concrete forming portion of the project to Pedersen, in clear violation of the subcontracting provisions of the Collective Agreement.

31. Having received a phone call from a Union member (employed directly by Cy Rheault) about the number of non-union carpenters that were working on the site, Mr. Parent visited the New City Hall project on the morning of November 15th. At this time he observed the six employees of Pedersen, none of whom were Union members and who the Union member who had called him said had been performing carpenters' work in connection with the concrete forming for this project. Having first talked to the Union member, Mr. Parent then briefly spoke to Dan Little, who was a

working foreman for Pedersen (although on this site he generally deferred to Mr. Lachapelle who was a more senior foreman) before going off to speak with Cy Rheault's site superintendent who was apparently in the site trailer.

32. After approximately ten minutes, Mr. Parent returned to speak to Mr. Little for a second time. Exactly what happened next is the subject of some dispute. Mr. Little's evidence was that Mr. Parent told him that there were too many non-union men on site and that he needed some information from them (the Pedersen employees) in order for them to stay working there and in order for Cy Rheault to remit monies to the Union based on the work they were performing. Mr. Little testified that Mr. Parent then produced a pad (a pre-printed application for Union membership book) and that he asked Mr. Little to fill out and sign an application himself and to have all of the others do the same.

33. Mr. Little testified that he filled out and signed an application and then he took the pad around the site and had all of the other men on the crew (with the exception of Mr. Lachapelle) do likewise. Mr. Little's evidence was that he did not read what was written on the application that he signed or on the applications that he asked the others to sign. He testified that he had no idea that what he signed, and what he asked other to sign, was in fact an application to join the Union and stated that he had believed that he and the others were simply providing information which they needed to give to the Union in order to stay working on this site and which was required by the Union because of its relationship with Cy Rheault.

34. According to Mr. Little, while he was getting the other men's applications signed, Mr. Parent was talking to Mr. Lachapelle, who had come over to join the two of them just after Mr. Little had finished filling out his own application and just before he went to get the next employee (Jeffrey Dessureault) to fill out an application. Mr. Little claimed that after all of the employees (except for Mr. Lachappelle who refused to sign when asked to do so by Mr. Parent) had signed, Mr. Parent and Mr. Lachapelle walked over to join him (Mr. Little) and two other men who had just finished signing their own applications, Jerry Ridley and Christopher Inglis. Mr. Little stated that they were then also joined by another employee, Dustin Curran, who had previously been working further down the same trench that Messrs. Ridley and Inglis were working in. Mr. Little stated that it was at this time he gave the book back to Mr. Parent.

35. The four other employees that signed applications gave evidence which was substantially similar to Mr. Little's. They all claimed that they had been approached by Mr. Little who provided them with the application for membership book and told them to fill out and sign an application because the Union needed information about them if they were to continue working on this site. The employees all claimed that Mr. Parent had not been present when Mr. Little had got them to fill out applications although three of them (Ridley, Inglis and Curran) stated that Mr. Parent had come and spoken to them after Mr. Little had got them to sign. The employees all claimed that they did not read their applications and that they were not told, and were completely unaware, that by signing they were applying to join the Union. They claimed that they only really became curious and/or concerned about what they had signed when talking with each other, later that day, while having a break. It was at this time that Mr. Lachapelle phoned Mr. Parent and found out that the five other crew members had in fact all applied to join the Union and that the Union had (or was going to) filed this application for certification.

36. Mr. Parent's evidence was different in a number of crucial areas. He acknowledged that he told Mr. Little that there were too many non-union men working on the site in view of the arrangements that had been made with Cy Rheault. However, his evidence was that he had clearly told Mr. Little that he wanted all of the employees to join the Union and that Mr. Little and the other four men were clearly aware that they were filling out applications to join the Union. Mr. Parent testified that he was certain that the men knew what they were signing because he had accompanied Mr. Little around the site while the applications were being completed and talked with each of these men, to a greater or lesser degree, about the advantages of becoming a Union member (such as the wage rates and the benefits) and which of the Collective Agreement's classifications they might fall into. Finally, his evidence was that Mr. Little was not the first, but was the last man, to sign a card and that he only did so after obtaining signed applications from all of the other men (with the exception of Mr. Lachapelle). Mr. Parent's evidence in this respect (that Mr. Little was the last and not the first man to sign) is consistent with the serial numbers on the five applications for membership which the Union filed.

Decision

Statutory Framework

37. As dealt with in the Board's earlier decision, dated December 4, 2007, concerning the Union's preliminary motion with respect to Pedersen's allegations about the membership evidence (in relation to which all of the particulars pled by Pedersen were deemed to be true, as opposed to this decision which is obviously based only on the evidence called) there are two specific subsections of section 128.1 of the Act which are directly relevant to this situation. Subsection 128.1(5) states the following with respect to what the Board may consider in determining what percentage of employees in the bargaining unit were members of an applicant union as of the date of application:

> 128.1 (5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

38. In my December 4th decision, I determined that these circumstances did not involve a contravention of any of the three sections of the Act listed in subsection 128.1(5) and did not involve *fraud*. I did however find that, based on Pedersen's pleadings, it was at least arguable that the allegations concerning the manner in which the Union had collected its membership evidence in this case involved *misrepresentation* pursuant to subsection 128.1(5) of the Act.

39. In addition, subsection 128.1(13) states the following concerning the Board's powers once it has determined that an applicant union has exceeded the fifty-five per cent membership support threshold:

> 128.1 (13) If the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it may,
>
> (a) certify the trade union as the bargaining agent of the employees in the bargaining unit; or

(b) direct that a representation vote be taken.

As set out in the December 4th decision, the Board has as of yet had very little opportunity to consider under what circumstances it would exercise its ability under this subsection to order a representation vote. Accordingly, and given the nature of Pedersen's allegations concerning how the employees came to join the Union, it could not be said (at that time) that there was no possibility that the Board might order such a vote (as opposed to certifying the Union based on the membership evidence which it filed with its application) in this case.

Misrepresentation

40. As is made clear by the specific wording of subsection 128.1(5), the Board may disregard membership evidence filed by a trade union, in determining its level of support amongst the employees in the bargaining unit, where the Board is satisfied that such membership evidence resulted from misrepresentation. There are relatively few decisions specifically dealing with misrepresentation within the context of this subsection. However, in dealing with the concept of misrepresentation involving prior statutory card-based certification regimes, the Board has stated that in order for a union's conduct to undermine the reliability of the membership evidence, such that the Board will not consider it, the conduct must amount to *fundamental misrepresentation* (see *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444, *Alex Henry & Sons Ltd.*, [1977] OLRB Rep. May 288, *Leon's Furniture Ltd.*, [1982] OLRB Rep. Mar. 404). In this respect the Board accepts that there will often be an element of *salesmanship* involved in union organizing campaigns. As such not every statement made by a union organizer which may not be one hundred per cent accurate will amount to misrepresentation within the meaning of this subsection. Rather misrepresentation within the context of subsection 128.1(5) must involve a deliberate untrue statement(s) on the part of the union (and/or the individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely. In this case, I think the evidence falls short of such fundamental misrepresentation which subsection 128.1(5) of the Act speaks to.

41. Upon a careful review of his evidence, it is clear that Mr. Little did not testify that Mr. Parent told him that the applications which he (Mr. Parent) wanted the Pedersen employees to sign were not, in fact, applications to join the Union and would not be used in an application for certification. At its very best (from Pedersen's perspective) the evidence simply established that what Mr. Parent told Mr. Little, and therefore what Mr. Little thereafter told the remaining members of the crew, is that they needed to complete the application forms in order to continue working on the New City Hall site because of Cy Rheault's obligations *vis-à-vis* the Union. These men were clearly performing carpenters' work, and the Collective Agreement which Cy Rheault was bound to required union members (either employed directly by Cy Rheault or employed by unionized sub-contractors) to perform such work. Further, even though the Union's practice of permitting allows for the initial hiring of non-union carpenters, such men are still required to thereafter join the Union if they want to remain working. Therefore, it cannot be said that, from the Union's perspective, Mr. Parent's view which he expressed to Mr. Little (who thereafter advised the other men), that the Pedersen employees would either have to fill out the applications (and thereby join the Union) or stop working on this particular site, was in anyway an untrue statement which goes to the effect and purpose of the applications.

42. Accordingly, if Mr. Parent's (and subsequently Mr. Little's) words concerning the applications, in and of themselves, do not and could not constitute misrepresentation, what becomes most significant in these circumstances is the wording of the applications that these employees were asked to fill out and sign. These applications read as follows:

> APPLICATION FOR MEMBERSHIP
> in United Brotherhood of Carpenters
> and Joiners of America
>
> Local ____________
>
> Name: ______________________________
> Address: ______________________________
>
> Telephone: ______________________________
> Employer: ______________________________
> I hereby make application to become a member of the United Brotherhood of Carpenters and Joiners of America, and this Local Union. In doing so I hereby authorize the United Brotherhood of Carpenters and Joiners of America and this Local Union through its duly authorized representatives to act for me as collective bargaining agent in all matters relating to my wages, hours or working or other conditions of employment with my employer.
>
> Print name: ______________________________
> Signature: ____________________ Date: ____________________
> On behalf of the United Brotherhood of Carpenters and Joiners of America and this Local Union, I authorize receipt of this Application for Membership by the above signing applicant.
>
> ______________________________ Date: ____________________
> Signature of Receiver

43. The specific language of this application could not be clearer in establishing that by filling it out and signing it, an individual was applying for membership in the Carpenters' Union. All five Pedersen employees testified that they did not read the application before they signed and therefore had no actual knowledge as to what it was. However, I do not find their evidence in this respect to be credible. As a result of cross-examination, it was ultimately not disputed that each one of these men must have read at least certain portions of the application as they all agreed that they had personally filled out all of the parts of the application where an individual employee is required to supply information (being his name, once at the top and again at the bottom, his address, his telephone number, his employer and the date) and had all managed to sign the application in the correct place. By way of contrast, none of the five men had *inadvertently* filled out any of the parts of the application which the Union's *receiver* is required to complete. Therefore, I simply do not accept that each one of these five men could have filled out their applications so completely and so correctly without a single one of them managing to notice that the applications state, at the very top and in bold print, *APPLICATION FOR MEMBERSHIP in United Brotherhood of Carpenters and Joiners of America*. Certainly, none of these men stated that they were incapable of reading what was written on the application and all of them were able to write their own statements to the Board following the filing of this application for certification.

44. My conclusion that these men must have known that what they were signing, at the very least, appeared to be an applications to join the Carpenters' Union is also supported by the fact that two of them, Jerry Ridley and Jeffrey Dessureault had been members of unions in the past and had previously filled out similar membership applications. In addition, Mr. Lachapelle's clear and uncontradicted evidence was that, at the very time when Mr. Little was getting the applications signed (and he was apparently telling Mr. Parent that he would not sign), he had shouted out to the other employees on the site words to the effect of *be careful not to sign your life away*. Finally, even if I were to believe the employees evidence that Mr. Parent was not present, along with Mr. Little, when the applications were signed, it is still not disputed that he was on the site and could have been approached, and spoken to, by each and every one of them. In fact, with the exception of Mr. Dessurreault, all of the employees testified that they did speak with Mr. Parent a matter of minutes, if not mere seconds, after signing their applications. However, despite: the clear wording of the applications; Mr. Lachapelle's apparent warning to be careful what they signed; and, having the opportunity to ask questions of Mr. Parent, not a single man claims to have even attempted to clarify exactly what it was he was being asked to sign. Wilful blindness on the part of an employee does not mean a union has engaged in misrepresentation and therefore, even on Pederson's best case, this Union simply cannot be said to have *fundamentally misled* these employees, within the meaning subsection 128.1(5), in respect to the collection of membership evidence.

The Ordering of a Representational Vote

45. As noted above, even where the Board concludes that a union has exceeded the fifty-five per cent membership support threshold, under the provisions of subsection 128.1(13)(b) the Board still has discretion to order a representation vote rather than certifying the union on the basis of the membership evidence which it filed with its application. Despite this power of the Board, the very purpose of section 128.1 is to allow unions to elect to proceed by way of a card-based (as opposed to a vote based) system for construction industry applications for certification. Accordingly, it cannot be said that the two alternatives which the Board has under subsection 128.1(13) (of either certifying the union or ordering a vote), once it has determined that a union has exceeded the fifty-five per cent threshold, are equal. To my knowledge the Board has in fact only decided to rely upon a vote, in the face of a finding of such a level of membership support, in circumstances which involve displacement applications and has only speculated that such a vote might be required should a numerically significant amount of the membership evidence be *stale dated* (ie more than six months old – see for example, *Four Seasons Site Development Ltd.*, [2005] OLRB Rep. Nov./Dec. 954 (November 10, 2005)). Accordingly, the ordering of a vote under this subsection must very much be considered the exception to the general rule of certifying the union based on the membership evidence. Such votes should only occur in the most unusual of circumstances where the facts, although falling short of leading the Board to disregard the membership evidence based on any of the specific grounds listed in subsection 128.1(5) of the Act, nevertheless lead the Board to conclude that there is sufficient doubt about it such that a representation vote is necessary to confirm its overall reliability. Having carefully considered the evidence that was presented before me, I do not find this to be such a situation.

46. The starting point of my conclusions in this regard is my finding set out above concerning the clarity of the wording of the Union's applications for membership and my conclusion, having heard their testimony, that all five of the employees concerned must have read their applications before signing them. No matter how clear the words on the page and/or the explanation provided are, it is of course always possible that an individual employee is confused or unclear about the meaning and implications of the document which he signed. However, the Board's considerations in such

situations cannot be determined by the subjective understandings of an individual employee. If that were the case, card-based certification might well effectively cease to exist as it would always be open to a construction industry employer and/or an employee to allege that particular employees in a particular bargaining unit applied for did not appreciate the full implications of signing a union membership card. Rather, and as all of the cases relied on by the responding party make clear, in assessing the reliability of membership evidence the Board has always utilized an objective test which assumes that employees are reasonable, rational and sentient actors.

47. In these circumstances the wording on the applications which the employees signed (and which I have found they must have read) makes absolutely clear that by signing the application an employee was applying to join the Carpenters' Union and was authorizing that Union to act for him *as his collective bargaining agent in all matters relating to his wages, hours or working or other conditions of employment with his employer.* This application makes absolutely no reference to Cy Rheault and/or to any moneys to be remitted to the Union by a general contractor and/or to how many hours/days the employee had worked on this particular site. Given this, it is simply impossible to find that a *reasonable employee* would conclude that by filling out this document with detailed personal information and signing it, he was simply providing information to the Union concerning moneys which Cy Rheault had to remit to the Union and in order to stay working on the site, even if that was the full extent of Mr. Little's explanation. In such circumstances, and especially given the fact that some of these men had joined unions before by filling out similar applications and given Mr. Lachapelle's apparent warning to them to be careful about what they signed, it is simply impossible to conclude that a reasonable employee would not at the very least seek some form of definitive clarification and/or assurance that what he was being asked to sign was not, in fact, exactly what it said it was, namely an application to join a union and to have that union represent him in his employment with Pedersen, as opposed to being some form of unspecified document which the Union needed in order to collect money from Cy Rheault.

48. The only specific argument which was relied upon by Pedersen which might have led me to exercise my discretion and order a vote in this case relates to the identity of the *employer.* Based on the evidence, it is true that initially, at least, Mr. Parent thought that the men were employees of Cy Rheault rather than employees of Pedersen and was seeking to have them join the Union because of this. The Board has found that confusion about the identity of the employer might, in certain circumstances, lead it to doubt whether the membership evidence does in fact indicate the true wishes of the employees. For example, in *Dial Construction Ltd,* [1982] OLRB Rep. Dec. 1822, the Board stated:

> 15. A completely separate issue, however, relates to the reliability of Mr. Faubert's application for membership given the fact that he signed after being mistakenly advised by a union representative that he was working for Nick Giambardino, a firm obliged to employ only union members. The evidence when taken as a whole, raises a real concern in our minds as to whether when he signed the application for membership Mr. Faubert was indicating a desire to be represented by the union regardless of who his employer might be, and in particular whether he would have signed the document had he known that it would be used to support a certification application with respect to the respondent. In these circumstances, and given the fact that without Mr. Faubert the applicant would not have a majority of bargaining unit employees as members, we are of the view (absent consideration of the section 8 issue referred to below) that it would be

> appropriate for the Board to exercise its discretion under section 7(2) of the Act and obtain confirmatory evidence of employee desires by way of a representation vote.

49. However, in *Dial Construction, supra.*, it was the employee's confusion about who his employer was, which had arisen because of the incorrect statements made to him by the applicant union, that gave rise to the Board's concern once it became clear that his actual employer was a different company. There was no such confusion here. What ever Mr. Parent may have assumed, it is clear that there was no confusion on the part of these employees. They all knew throughout this entire process that their employer was Pedersen and there is no evidence to suggest that Mr. Parent ever told them anything different. Further, and quite conclusively here, every man listed *Pedersen* as being his employer on his application for membership in the Union and accordingly there can be no reasonable doubt that this was the *employer* that these employees were authorizing the Union to engage in collective bargaining with when they signed their applications.

50. Accordingly, I find the statements made by the employees concerning what they allegedly understood and intended when they signed their applications to be nothing other than *a change of heart*. The Board has clearly commented on its reluctance to attach any weight to such statements. For example, in *Silver Concrete Pumping Limited*, [2007] OLRB Rep. Sept. 943, the Board stated:

> 10. On the other hand, the experience of the Board over the past 50 years has been to place little weight on an apparent "change of heart" on the part of an employee who seeks to disavow the card he signed within a short period of time. The Act, of course, gives no significance on any "second thoughts" that an employee may have after joining a union. Subsections 128.1(4) and (5) make such considerations irrelevant. It is important to distinguish between a change of heart about joining the union, and a genuine subsequent realization that what the employee did was substantially different from what it was represented to be. In doing so, the Board treats employees as reasonable and responsible adults. That is, it assumes that people read what they sign and do not behave in a frivolous or uncaring manner about events and documents that may have a significant effect on their life. In addition, one is always concerned as to whether an employee's desire to make representations may be inspired more by his or her concern about the employer's reaction to the application, than any sudden realization that things are not as they appeared to be a few days before.
>
> ...
>
> 12. The statement itself presents two contradictory statements. First, he says that he was misled because "The union told me the card was to show that we had met and talk [sic]". A few lines later he says: "They told me I had to sign because I was in the union from a previous workplace". The inconsistency itself was troubling, and in any event, neither explanation is reasonable. The form of the membership card submitted is relatively simple and quite straightforward. Above the name and personal information to be filled in, the card simply says:
>
> APPLICATION FOR MEMBERSHIP
> INTERNATIONAL UNION OF OPERATING ENGINEERS
> LOCAL 793
>
> Obligation of Membership

> I agree to abide by the Constitution of the I.U.O.E.
> I wish the I.U.O.E., Local 793 to represent me for
> the purpose of collective bargaining
>
> The print is large and easy to read. It requires the employee's name, address and so on. This large amount of information required of a person executing the card is entirely inconsistent with the first explanation given. In any event, Mr. Fierheller does not allege he has any difficulty in reading the English language and was certainly able to write to the Board in that language, expressing his views quite clearly. Faced with the clear and simple layout of the card, the contradictory explanations offered seem unreasonable. That is, it is not reasonable that an employee who is presented with a card and provided with either of those two explanations would willingly sign the card believing that the purpose was only the one that was alleged to have been made by the Union organizer.
>
> ...
>
> 17. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. *There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.*
>
> [emphasis added]

51. Amongst other decisions, this approach was followed by the Board in *Steelcase Construction Inc.*, 2007 CanLII 48469 (ON L.R.B.) (Board File No. 2186-07-R) where, in circumstances largely similar to these, the Board stated:

> 9. This case is entirely consistent with the facts in *Silver Concrete*. There the submission too was that the employee thought he was signing something different than a union card. In that case the allegation was that the employee was signing in order to indicate that he had met and talked with the union and further to confirm that he had been represented by a union in a previous workplace. The Board rejected the explanation for signing as not reasonable.
>
> 10. On the same basis, I do so here. There is nothing written on the card about training. It is certainly possible that a union representative speaks of training during a conversation with employees. In the Board's experience that, along with wages and working conditions, may arise in the context of a union organizing campaign. However, whether this occurred or not is merely speculative. The employee at issue signed a card that clearly indicated what it was for. He is an adult and there is no suggestion that he could not have read or understood what was written. I am not persuaded that this set of facts represents anything other than a change of heart. I am bolstered in this conclusion by the fact that the submission is put forward by the employer and not advanced by the employee on his own behalf.
>
> 11. Having regard to the above reasons, I am not prepared to disregard this membership evidence in assessing whether or not the applicant had sufficient support on the application filing date.
>
> ...

> 13. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. *There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.*
>
> [emphasis added]

52. The above set out statements of the Board are clearly directly applicable to this situation and accordingly I find there is no basis which would lead me to exercise my discretion under subsection 128.1(13)(b) to order a representation vote (if I find that the Union has met the appropriate membership support threshold).

DISPOSITION

53. Given my findings set out herein, and on the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act), I am satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of 5 of 9 employees I have found to be in the bargaining unit.

54. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. Again, given my findings set out herein, there is nothing raised in the application or the response that would cause me to consider directing a representation vote.

55. I am satisfied that the Board should certify the applicant.

56. Despite the fact that there was no dispute as to what the active job sites on the date of application were, at the conclusion of the hearing in this matter there remained some confusion between the parties as to what the exact description of the appropriate bargaining unit should be (mostly as this application relates, in part, to the *white area* of the Board's map of the province). Accordingly, the Board hereby directs the parties to file their submissions concerning any agreement they may have now reached in this respect, or concerning their positions as to the correct description of the appropriate bargaining unit (if no agreement has been reached), within ten days of the date of this decision, following which the Board will make the appropriate determinations and the appropriate certificates will be issued.

4082-04-G International Union of Operating Engineers, Local 793, Applicant v. **Sterling Crane – A Division of Procrane Inc.**, Responding Party

Collective Agreement – Construction Industry Grievance – *Ontario Human Rights Code* – Remedies – A crane operator, with nineteen years experience and a clean discipline and accident record, reversed his crane into three overhead power lines resulting in an explosion and loss of power in the area – The employer, after an immediate site investigation, was not able to rule out impairment through the use of drugs or alcohol and, in accordance with its

policy, directed the grievor to submit to drug and alcohol testing – The grievor refused to submit to the testing on information from his union that such a request violated his human rights – The employer considered his refusal to be a positive test result and, as a result in addition to a ten-day suspension, he was held out of service – First, the Board found the employer's policy—to conduct post incident urinalysis testing in a safety sensitive workplace—was in compliance with the collective agreement (a legitimate exercise of management rights) and the *Code* – Second, the Board found that the employer did not violate either the collective agreement or the *Code* by requiring the grievor to submit to the test – Third, the Board found that the employer's treatment of the grievor's refusal as a positive test result was without any consideration of the surrounding factors that may have mitigated against that conclusion: the veracity of the reasons for refusing the test and the long service of the applicant without any discipline or accident – Treating the grievor's refusal to submit to a test as a positive result was an unreasonable exercise of management rights, and discrimination of the grievor on the basis of a perception that he was a substance abuser, respectively amounting to a violation of the collective agreement and s. 5 of the *Code* – Finally, the Board found that the employer's holding the employee out of service was a violation of the collective agreement and *Code* which flowed from the above analysis – Declarations and directions made – Grievance allowed

BEFORE: *Norm Jesin*, Vice-Chair.

APPEARANCES: *Jeffrey M. Andrew* and *Ken Lew* for the applicant; *Richard J. Charney* and *Brian Reeve* for the responding party.

DECISION OF THE BOARD: December 14, 2009

INTRODUCTION

1. This case involves a dispute between the parties regarding the ability of an employer to conduct what is referred to as reasonable cause and/or post incident drug and alcohol testing in a safety sensitive workplace.

2. The facts giving rise to the dispute may briefly be described as follows.

3. The Responding Party is a subcontractor providing crane rentals and operators on construction sites throughout Sarnia and Lambton County. It is the successor to a business known as Sarnia Crane, which was the subject of a previous dispute involving drug testing which was litigated before the Board and which was the subject of argument before the Board in this case. That decision is cited as *Sarnia Cranes Limited,* [1999] OLRB Rep. May/June 479, and will be referred to as *Sarnia Cranes.* At all material times the Responding Party was bound to the Applicant's provincial collective agreement pertaining to the industrial, commercial, and institutional sector of the construction industry.

4. In this case the Responding Party was providing its services at the Suncor refinery in Sarnia, Ontario. On the date in question, December 7, 2004 the grievor was employed by the Responding Party at the Suncor site. At that time the grievor had been engaged as a crane operator in the Sarnia area for approximately nineteen years. He had been employed by the Responding Party since 2000 and had been employed by a contractor known as Falco for fifteen years. The grievor

became employed by the Responding Party when it acquired Falco along with Sarnia Cranes, in 2000. The grievor had a clear discipline and accident record at the time of the incident in question.

5. On the date in question the grievor reversed his crane and backed into three overhead power lines carrying 27,000 volts of electricity. This resulted in an explosion and a loss of power in the area for forty-five minutes. There was an immediate site investigation in which it was determined that the grievor reversed without a signalman and without conducting a field level risk assessment. In addition, the Responding Party was unable to rule out impairment through the use of drugs or alcohol as a contributing factor. The Responding Party therefore directed the grievor to submit to drug and alcohol testing. The test was directed in accordance with the Responding Party's drug and alcohol policy. In accordance with the policy, drug testing is conducted by urinalysis and alcohol testing is conducted by breathalyser. The grievor refused to submit to testing because of information from his union that a request for such testing was in violation of his human rights.

6. As a result of its investigation the Responding Party issued the grievor a ten day disciplinary suspension. It also suspended the grievor indefinitely for his refusal to submit to the test. Essentially, the Responding Party treated the refusal as tantamount to a positive result. The Responding Party therefore determined that the grievor could not return to work until he provided a further negative test result, agreed to attend substance abuse program counselling and agreed to further temporary, unannounced testing.

7. Ultimately, the Applicant and the grievor agreed to accept the ten day disciplinary suspension. However, they maintain that the directive to the grievor to submit to a testing, and the consequences for failure to submit were implemented in violation of the provincial collective agreement and of the *Human Rights Code*, R.S.O. c. H 19, as am. (hereinafter the *HRC*). They assert that the Responding Party's actions were an unreasonable exercise of its management rights amounting to unjust discipline and further, that the Responding Party has discriminated against the grievor because of a perceived disability, contrary to s. 5 of the *HRC*.

THE INCIDENT, INVESTIGATION, AND EMPLOYER RESPONSE

8. It was a cold, windy and rainy day on December 7, 2004, the date of the events in question. The incident took place at dawn and the light was flat. On that morning the grievor was driving a 50 ton Tadano Rough Terrain crane at the Suncor refinery in Sarnia. The grievor was working in sight of some overhead power lines. The evidence established that the grievor was aware of the presence of the lines, though there were no visible markers on the lines. Later, after the incident, coloured markers were placed on the lines to make them more easily visible to anyone working nearby.

9. At approximately 8.05 a.m., the grievor put his crane into reverse mode. He did so without using a signal person, something which the grievor later acknowledged he ought not to have done. The grievor also failed to complete a field level risk assessment prior to reversing his crane. While in reverse, the grievor raised the boom of his crane to get it ready for his work day. As he was reversing, the crane approached three power lines. The evidence established that when the crane hit the first line nothing happened as his crane was grounded. However, as he continued to reverse, he pushed one line into contact with another so that an arc, or explosion, occurred. This resulted in a loss of power to the power utility's customers which lasted close to forty-five minutes. It also created a very dangerous situation as the line in question carried 27,000 volts of electricity through it.

10. Brian Reeve was the Responding Party's Sarnia Branch Manager at the time of the incident. On the morning of December 7, 2004, he had been made aware that there was a crane contact with a wire and that there had been a power outage. Shortly after 8 am he proceeded to the scene of the crane contact. When he got there he saw the crane resting forty to fifty feet from the downed power line. There were other pick up trucks in the area (indeed there were investigators from Blue Water Power, the local utility, and other investigators as well). He saw the grievor a few minutes after he got to the site. Mr. Reeve conceded in cross examination that the grievor did not exhibit any noticeable signs of impairment during the investigation, although the evidence did establish that Mr. Reeve was not trained to observe signs of impairment.

11. When Mr. Reeve arrived at the scene of the incident, he first assured himself that the grievor was unhurt. He then suggested to the grievor that he not talk to anyone just yet. This was for the grievor's own protection and for the protection of the Responding Party. Mr. Reeve also indicated to the grievor that he might be required to take a drug and alcohol test. The grievor responded by saying he would refuse to submit to such a test.

12. Mr. Reeve and the grievor then proceeded back to the Responding Party's office where a meeting was held which included representatives from Suncor and Blue Water Power. That meeting was held within one to two hours of the incident. At that meeting, the grievor refused to acknowledge that he made any contact with the power lines. This, according to Mr. Reeve, heightened the tension in the meeting. On instruction from Jack Sherman, the Responding Party's Regional Manager, Mr. Reeve indicated that the Responding Party was requiring the grievor to submit to a drug and alcohol test. The grievor, as promised, did indeed refuse to submit to such a test on the ground that based on the Union's advice, such a test was in violation of his rights.

13. Russ Brown is the Responding Party's Director of Health, Safety and Environmental Affairs. He began investigating the incident on December 8, 2004. On that day he met at the site with the grievor and his steward, Brad Sisler. Mr. Brown learned that when the grievor got to the gate at the entrance of the site the previous morning, the grievor was asked to wait until a signal man got back. He then proceeded to rig down the crane and lowered his boom to 45 degrees. He proceeded to reverse his crane to prepare himself to work. The grievor thought it ok to reverse without a signal man as he was on an outside roadway and not yet in the actual work site. In any event, when he was reversing, the grievor heard an explosion, stopped reversing and moved forward to his previous position. Again, the grievor refused to acknowledge that he contacted the wires with his crane.

14. Mr. Brown then held a conference call around December 20, 2004 which included the grievor and Mr. Sisler. The purpose was to reinterview the grievor.

15. After the interview it was concluded that the grievor did not follow proper procedures for reversal by not engaging a signal person and not performing a field level risk assessment. In addition, he did not maintain the necessary clearance from a power line as required by provincial regulation (three metres). Finally, it was determined that his crane did indeed come into contact with the power line. As a result, the Responding Party imposed a ten day disciplinary record on the grievor. Mr. Brown explained that power line contacts are the greatest cause of operator death in the industry and that company policy may therefore result in dismissal for making contact with a power line. However, given the grievor's overall record it was determined that a ten day suspension would be sufficient.

16. In addition, it was determined that the requirement for the grievor to test for drug and alcohol use was consistent with the Responding Party's policy for post incident testing. Mr. Brown explained that post incident testing is indicated when it is necessary to rule out impairment from drug or alcohol use as a cause of an accident. It was further determined in accordance with the Responding Party's practice that the grievor's failure to test would be considered as a positive test result. That meant that the grievor was to be held out of service until he provided the Responding Party with a negative test result, agreed to submit to rehabilitation, and to further testing. Furthermore, the grievor was informed that upon his return to work, the grievor's refusal to test could lead "to further discipline up to and including discharge".

THE RESPONDING PARTY'S DRUG AND ALCOHOL POLICY

17. The Responding Party first introduced a drug and alcohol policy on a corporate wide basis in 1992. It implemented such a policy because of the inherent risks and dangers of operating a crane. In 2003, the Responding Party began to discuss the implementation of a policy specific to Ontario with its employees and it implemented such a policy in 2004.

18. Under the policy, employees are "strictly prohibited" from the use of alcohol, illegal drugs, or the intentional misuse of other drugs while on the Responding Party's business or premises. They are further prohibited from being under the influences of such substances while on the Responding Party's business or premises.

19. The Policy provides for both "post incident" and "reasonable grounds" testing as follows:

> A) **Post Incident:**
>
> **i.** Sterling Crane defines an incident as any event which results in unintended harm to people or damage to property.
>
> **ii.** A supervisor of an employee must request an employee to submit to an alcohol and drug test if the supervisor and the next level of management at the company cannot reasonably eliminate alcohol or drugs as a contributing factor.
>
> **iii.** A supervisor or manager must provide to the employee the reason for the request.
>
> B) **"Reasonable grounds or "reasonable cause"** for testing may include, but is not limited to:
>
> **i.** Odour of alcohol;
>
> **ii.** Slurred speech;
>
> **iii.** "groggy' or disoriented behaviour;
>
> **iv.** Glassy eyes, flushed face;
>
> **v.** Unsteadiness in standing, walking, etc.;
>
> **vi.** Acting in a suspicious or unusual manner;

vii. Explained inability to correct a chronic job performance or behaviour problem;

viii. Excessive sick leave or suspicious patterns of sick leaves;

ix. Involvement in a post rehabilitation program.

20. Under the policy, employees subject to post incident or reasonable cause testing are tested for the presence of a variety of substances including alcohol, amphetamines, barbiturates, opiates, cannabinoids and cocaine. Testing is done by breathalyzer for alcohol and by urinalysis for drugs. The testing is managed by a third party administrator. A urine sample is forwarded to an independent laboratory. The laboratory, in conjunction with a Medical Review Officer ("MRO"), makes the determination as to whether the test is reported as positive or negative. A test which appears positive will result in a discussion between the donor and the MRO. It will be reported as negative if there is some legitimate medical reason for the result or if the result is below a designated cut-off level.

21. Where the result of a test is positive, the Responding Party is to determine an appropriate course of action, which may include disciplinary action. The affected employee may be required to undergo rehabilitation and/ or counselling. It has been the Responding Party's practice, though not formally part of the policy at the time of the incident, to treat a refusal by an employee to submit to a test as equivalent to a positive test result. The consequence of this approach is that an employee who refuses to submit to a test is deemed unfit for duty and must comply with a variety of steps before he/she can be re-employed. These steps include the provision of a negative test, some agreement to future testing and some commitment to rehabilitation and/or counselling.

EXPERT EVIDENCE REGARDING TESTING

22. The parties presented reports and viva voce evidence from an impressive array of expert witnesses on various topics including toxicology, pharmacology, the assessment of substance use, abuse and dependence and the measurement of such use by urinalysis, other forms of testing and by direct observation. The Responding Party's witnesses included Joel Mayer, a pharmacologist and forensic toxicologist; Barbara Butler, an expert on the formulation, implementation and administration of workplace policies relating to the use and testing of drugs and alcohol in the workplace; and Leo Kadehjian, toxicologist educated at Harvard University and the Massachusetts Institute of Technology, now consulting for United States' Courts in drug testing and the interpretation of results. The Union's chief witnesses were Dr. Harold Kalant, professor emeritus in pharmacology at University of Toronto medical school, director emeritus at Cambridge University and director of the Addiction Research Foundation; Dr. Bhaushan Kapur, an expert in clinical chemistry, pharmacology, lab oversight and clinical interpretation of testing results. He has been a consultant to Canadian medical laboratories and has overseen laboratories responsible for drug testing and the interpretation of testing results.

23. Some of these witnesses had given evidence in other previous cases such as *Sarnia Cranes* and *Sarnia Construction Association* (infra) and their evidence did not differ to any significant degree to their evidence as described in those cases.

24. The witnesses presented a great deal of evidence concerning protocols of testing, the period of time substances may be found in the urine or in the blood, the effect of various categories of substances on one's judgment and ability to perform at work. The Responding Party's witnesses were

unanimous that urinalysis testing was probative in an investigation as to whether impairment due to ingestion of drugs would be a causal factor in any particular accident or incident. Perhaps the strongest evidence in this regard came from Dr. Mayer, who testified that the degree of concentration of a substance as shown in a test could be a probative factor from which a conclusion of impairment might be made. The evidence further confirmed that a breathalyser can provide evidence of impairment from alcohol.

25. Still, all of the witnesses agreed that urinalysis testing of the sort requested by the Responding Party in this case cannot confirm impairment of any individual. Indeed, the evidence suggested that some of the substances tested for, such as marijuana, may stay in one's system for days and even weeks – long after any impairment would have dissipated. The evidence did indicate that any urinalysis test should be conducted within a short period of time after the incident, two to four hours later at most, in order to have any probative value.

26. The evidence also confirmed that individuals can be trained to observe signs of impairment. Studies dealing with police officers were referenced showing that officers were able to assess impairment with an accuracy rate of between 75% and 95%, depending on the number of factors that were observed.

SUBMISSIONS OF THE PARTIES

27. In was the submission of the Responding Party that post incident drug and alcohol testing following workplace accidents has now become accepted as being in compliance with collective agreements and human rights legislation in Canadian jurisprudence. In addition, counsel asserted that administrative responses to employees who refuse to submit to such testing have also become accepted in the jurisprudence. Therefore counsel submitted that the Responding Party's drafting and implementation of its policy regarding post incident testing is in compliance with the collective agreement and the *HRC*.

28. In addition, counsel asserted that the jurisprudence accepts the Responding Party's practice regarding the refusal of an employee to submit to testing. Therefore, counsel submitted that the Responding Party's decision to hold the grievor out of service until he could satisfy the Responding Party that he is "drug and alcohol free", is also unimpeachable, and in compliance with the collective agreement and the *HRC*.

29. Counsel asserted in argument that there are ten principles pertaining to post incident testing that may be drawn from the myriad of cases dealing with post incident testing. Those principles are:

> 1. With or without consent of the union, an employer may test for drugs and alcohol on a post incident basis.
>
> 2. A post incident test can be ordered following a significant incident or near miss and where the condition of employee is a reasonable line of enquiry.
>
> 3. The law regarding random testing is different and not applicable to the acceptability of post incident testing.

> 4. Supervisory assessment of the individual employee concerned is not a precondition to post incident testing.
>
> 5. An employer should not require a post incident test if the incident is inconsistent with employee error.
>
> 6. Where it is not clear whether an incident arises from employee error, post incident testing is permitted because the condition of employee is a reasonable line of inquiry. Alcohol testing clearly reveals impairment. Drug testing provides evidence that impairment might have been a factor.
>
> 7. Any drug and alcohol testing scheme must have privacy and quality safeguards and must be subject to review by a medical review officer to ensure accuracy.
>
> 8. Where an employee refuses to test, he/she does so at his/her peril and an employer can draw negative inferences about the employee's fitness from the refusal to submit to a test.
>
> 9. Where an employee refuses to submit to a required test, the employer may impose administrative requirements such as counselling, and further testing.
>
> 10. While testing does have human rights implications, those are exaggerated since drug and alcohol use does not necessarily reflect that the employee has an addiction and hence, a disability.

30. Counsel commenced his analysis of the arbitral jurisprudence by asserting that the Responding Party's drug and alcohol policy and its implementation constituted a reasonable exercise of its management rights in accordance with the standards set down in the seminal case of *KVP Co. Ltd.* (1965), 16. L.A.C. 73 (Robinson). Counsel noted that in analyzing and reviewing the ability of employers to implement drug and alcohol testing policies, arbitrators have consistently applied a "balancing of interests" approach as reflected by the following quotation from *Weyerhaeuser Co.*, [2004] B.C.C.A.A.A. No. 71 (Taylor), at paragraph 136:

> I am keenly aware of the competing interests striving for dominance here. The union seeks protection for the privacy and dignity of individual employees and the right to be free form unreasonable invasion of those strongly held Canadian values. The company operates in a safety sensitive environment and seeks to protect the safety and well being of its employees and operations consistent with its public duty. The solomonic task is to reconcile those competing interests in the light of established jurisprudence.

31. Counsel noted that in applying this approach arbitrators have consistently found post incident testing to be a justifiable component of a workplace drug and alcohol policy. Counsel relied on a number of cases to establish that proposition, including *J.D. Irving Ltd.*, (2002), 111 L.A.C (4th) 328 (M.G. Picher); *Canadian National Railway* (2000), 95, L.A.C. (4th) 341 (M.G. Picher); *Imperial Oil*, [2001] A.G.A.A. No. 102 (Sims); *Fording Coal Ltd.*, [2002] B.C.C.A.A.A. No. 9 (Hope); *Continental Lime Ltd.* (2002), 105 L.A.C. (4th) 263, (Freedman); *Fording Coal Ltd.* (2002), 112 L.A.C. (4th) 141 (Glass); *Fording Coal Ltd.*, [2002] B.C.C.A.A.A. No. 243 (Love); *Elk Valley Coal Corp.* (2003), 121 L.A.C. (4th) 280 (Lanyon); *Elk Valley Coal Corp.*, [2004] B.C.C.A.A.A. No. 249 (Sanderson); *Suncor Energy Inc.* (2004), 128 L.A.C. (4th) 48 (Jones); *Vancouver Shipyards Co.*

(2006, (156 (L.A.C. (4th) 213 (Hope); *Superior Propane Inc.*, unreported, January 29, 2007 (M.G. Picher); *Greater Toronto Airports Authority*, [2007] C.L.A.D. No. 243 (Devlin); *Canadian National Railway Co.*, [2007] C.L.A.D. No. 353 (Albertyn) and *Imperial Oil Ltd.* (2006), 157 L.A.C. (4th) 225 (M.G. Picher, affd. [2008] O.J. No. 489 (Div. Ct.) and (2009), 96 O.R. (3d) 668 (C.A).

32. Counsel pointed out that the Responding Party's policy was reviewed by arbitrator Jolliffe in the recent decision *Mechanical Contractors Assn. of Sarnia*, [2008] O.L.A.A. No. 621, (also known as *Sarnia Construction Association)* and that Joliffe did not invalidate any portion of that policy. Indeed, after reviewing the drug and alcohol testing policies of the members of the Association (including presumably that of the Responding Party) Mr. Jolliffe stated the following at paragraph 151:

> … they [the policies] are acceptable where an incident/accident has occurred where there is cause to suspect alcohol or drug use by reason of the occurrence itself, observations and surrounding circumstances, and in such cases testing should be done as soon as possible …

33. Counsel next explained why the request for a post incident test was reasonable in the circumstances of this case. He noted that the incident was very serious in nature and that there were no structural, mechanical or environmental factors which could be confirmed as causes of the accident. He noted that the grievor made serious errors of judgment in not using a signal person to back up the crane and in not doing a field level risk assessment before backing up. He drew examples from the cases cited above to show that arbitrators had upheld the employer's right to drug testing in circumstances similar to the one in this case, and further that employers have substantial latitude to require post incident testing when necessary to investigate a safety event

34. In defense of what the Responding Party refers to as its "administrative response" to the grievor's refusal to submit to testing, counsel submitted that it was a reasonable exercise of the Responding Party's discretion to impose these administrative requirements in place of discipline for what was a disciplinary offense. Counsel acknowledged that the Responding Party's policy does not explicitly provide the sanctions that might follow from a refusal to test. He noted that the policy does indicate that the Responding Party will take "an appropriate course of action" in circumstances as required.

35. Counsel noted that arbitrators have previously indicated that the refusal to submit to reasonable testing requirements may allow an inference to be drawn regarding the employee's use of prohibited substances. Counsel relied on a number of cases in support of that proposition including *Canadian Pacific Ltd.* (1987), 31, L.A.C. (3d) 179 (M.G. Picher); *National Gypsum (Canada) Ltd.* (1997), 67 L.A.C. (4th) 360 (MacKeigan) and *Westhore Terminal Ltd.*, [2006] B.C.C.A.A.A No. 242 (Ready). In *Westhore Terminal Ltd.*, the grievor was found in possession of prohibited drugs in the workplace. The arbitrator concluded at paragraph 32 that the employer had "solid foundation" to question the grievor's fitness to work. The arbitrator upheld the employer's decision to hold the grievor out of work until he agreed to submit to pre-reinstatement testing and further and ongoing random testing, notwithstanding that the employer's policy did not expressly provide for these measures.

36. Finally, counsel submitted that the Responding Party did not discriminate against the grievor contrary to the *HRC*. Counsel notes that the jurisprudence has accepted that an employer has a

bona fide occupational requirement in maintaining a workplace free from substance impairment. Counsel relies on *Sarnia Construction Association, CN Railway* and the Ontario Court of Appeal decision in *Entrop v. Imperial Oil Limited,* [2000] O.J. No. 2689; 50 O. R. (3d) 18, for this proposition. Counsel further submitted that the policy treats casual users the same as those that suffer from substance abuse or dependency. Counsel also submitted that neither the Responding Party nor its policy perceives employees to be disabled (ie: suffering from substance abuse or dependency) as a result of a positive test. Counsel argued that the jurisprudence conclusively establishes that drug policies providing for reasonable cause and post incident testing do not constitute discrimination contrary to Human Rights legislation.

37. Counsel acknowledged that this Board had previously ruled that the drug and alcohol testing policy of a predecessor to the Responding Party was contrary to the collective agreement and the *HRC* in *Sarnia Cranes*. Counsel distinguished that case by noting that the policy under review included pre-employment testing, random testing, reasonable cause testing and post incident testing. He submitted that *Sarnia Cranes* has not been followed insofar as reasonable cause and post incident testing are concerned in cases such as *CN Railway Ltd., Weyerhaeuser Co.* [2004] B.C.C.A.A.A. No. 71 (Taylor) and that it would have been decided differently if decided after the Court of Appeal's decision in *Entrop*.

38. Counsel acknowledged that urine testing for drugs cannot establish impairment. He asserted however that post incident testing is a valuable tool from which, along with other factors present in an incident, an inference of impairment may be made sufficient to satisfy a civil balance of probabilities. Furthermore, a negative test may rule out impairment as a cause of the incident. Counsel asserted that the utility of a post incident test as part of an investigation was recognized in the jurisprudence and indeed by some of the expert witnesses who testified in this case, including Dr. Kadehjian, Ms. Butler and Dr. Kapur.

39. For all these reasons counsel requested that the grievance be dismissed.

40. In his submission, counsel for the Applicant acknowledged that the jurisprudence has accepted the ability an employer to conduct post incident testing. However, counsel asserts that that ability is not unlimited. Rather, he submitted that the Court of Appeal decision in *Entrop* affirmed the Board of Inquiry decision in that case that post incident testing "may be permissible but only if the respondent can establish that the testing is necessary as one facet of a larger process of assessment of drug abuse". In his submission, counsel referred to many of the same authorities as were submitted by the Responding Party but asserted that they do not authorize testing in the circumstance of this case, and they do not authorize the Responding Party's administrative action against the grievor.

41. Counsel submitted that post incident testing should not be a reflexive response to any incident and that in this case it was not reasonable for the Responding Party to demand that the grievor submit to testing. Counsel noted other factors that gave rise to the incident, including the weather, and the fact that the grievor did not engage the assistance of a signal person. Counsel noted that Mr. Reeve acknowledged in his evidence that the grievor did not show any signs of impairment when Mr. Reeve investigated the incident.

42. Counsel pointed out that the regulations were not entirely clear as to whether the use of a signal person was required in this case. He acknowledged that the grievor made an error in judgment in not engaging a signal person and that the two week suspension he received was therefore

appropriate. Counsel asserted that the administrative action holding the grievor out of service should be viewed as a further and unjustified disciplinary response to his role in the incident.

43. Counsel asserted that the expert evidence confirmed that urinalysis testing cannot establish that an individual was suffering from impairment at the time of testing. Such testing is therefore not probative in and of itself. Counsel noted the evidence that supervisors may be trained to observe signs of impairment and that a positive test coupled with such observations may result in a reasonable inference of impairment. However, in this case, there were no other factors from which such an inference could be made. Therefore the request for the test was unreasonable.

44. Counsel submitted that that the evidence disclosed that by treating the grievor as having had a positive test result and by holding him out of service, the Responding Party perceived him to be suffering from substance abuse – that is it perceived him to be suffering from a disability as defined by the *HRC*. As a result, the Responding Party treated the grievor as posing a greater safety risk than other employees and thereby discriminated against him in violation of s. 5 of the *HRC*. Counsel notes that the expert evidence disclosed that substance abuse, which amounts to misuse of a substance short of a dependency, is considered a disability. Counsel argues that cases such as *Sarnia Construction Association* and the M.G. Picher cases are not helpful as they do not consider the particular inequality of treatment as against employees suffering from substance abuse.

45. In the end, counsel submitted that even in post incident circumstances, an employer must demonstrated that it is reasonable in all the circumstance to require a test. Counsel asserts that even cases relied on by the Responding Party such as *Weyerhaeuser Co.* and *Sarnia Construction Association* support that proposition (see *Sarnia Construction Association* at para 151. See also *Construction Labour Relations* (2004), 129 L.A.C. (4th) 1 at p. 29.

46. Finally, the Applicant made two alternative submissions if it is concluded that the Responding Party did have the right to require a test. First, counsel submitted that the grievor should not have been penalized for refusing to submit to a test as he was acting on his rights as he understood them following the issuance of the Board's decision in *Sarnia Cranes*. In the further alternative, even if the grievor was obliged to accede to the request, the Responding Party's response to his refusal to test was way out of proportion to any acceptable response as he has now been held out of service since 2004.

47. For these reasons the applicant requests that I allow the grievance and reinstate the grievor. The parties agree that should I determine that any compensation should be considered that I remit the matter to the parties for their consideration and remain seized to ultimately determine the matter.

DECISION

48. It seems to me that the Responding Party's position in this case is dependent on my acceptance of the following four propositions:

> 1. The Responding Party is justified and in compliance with the collective agreement and the *HRC* in implementing a drug and alcohol policy that provides for post incident testing where necessary to rule out impairment as a cause of an incident.

> 2. The Responding Party was therefore justified, and in compliance with both the collective agreement and the *HRC* when it required the grievor to submit to post incident drug testing in this case.
>
> 3. The Responding Party was justified and in compliance with the collective agreement and the *HRC* when it treated the grievor's refusal to submit to testing as equivalent to a positive result.
>
> 4. The Responding Party was justified, and in compliance with the collective agreement when, because it deemed the grievor to have tested positive for prohibited substances, it refused to allow the grievor to return to work until he provided the Responding Party with a positive test, agreed to attend counselling, and agreed to future random testing.

49. If I am unable to accept one any of these propositions, the grievance must succeed. If I conclude that all of them are well-founded, then the grievance must fail. I will deal with each question in turn.

Q 1. Was the establishment and implementation of a drug and alcohol testing policy that provided for post incident testing in compliance with the collective agreement and or the *HRC*.

50. I have framed the question under consideration to reflect that there is a distinction in the jurisprudence between assessing whether a testing policy violates management rights under a collective agreement on the one hand and whether the policy is in violation of the HRC. I will deal with each issue separately.

A. Collective Agreement Analysis

51. The cases that consider such policies in the context of a collective agreement begin from the premise that any management rule or policy must meet the standard of reasonableness first espoused in *KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson). The development of the law in this area is well set out in arbitrator Taylor's 2004 decision in *Weyerhaeuser Co.*

52. Essentially and summarily, a drug and alcohol testing policy (as any other policy) must be justified as being reasonably related to the legitimate interests of the employer. In *CN Railway Co.* (1989), 6 L.A.C (4th) 381 (M.G. Picher), the arbitrator stated at p. 387 that the right of an employer to demand a drug test must be established "on reasonable and probable grounds" as such right is a "singular and limited exception to the right of freedom from physical intrusion".

53. In *Provincial-American Truck Transporters* (1991), 18 L.A.C. 412 (Brent) the arbitrator formulated a two step test to determine if drug testing could be justified. She concluded that drug testing would be within management's rights if reasonable cause to demand the test existed. But for universal testing to be sustained, an employer would have to first prove that there was a drug and alcohol problem in the workplace and then prove that lesser non-invasive tests were not effective in solving the problem. (See p. 425.)

54. This two step approach was adopted by this Board in its decision in *Sarnia Cranes Limited*. In that case the challenged policy provided for four types of testing – pre-access testing to anyone offered employment to safety sensitive positions; reasonable cause testing; post incident

testing and monitoring testing for employees who had previously tested positive for use of screened substances. After referring to the two step test used in *Provincial-American Truck Transporters*, the Board concluded at paragraph 213 that it was "appropriate in this proceeding to analyze the evidence before us by reference to that same standard …".

55. The Board then concluded at paragraph 216 that the evidence did not establish that there was a drug or alcohol problem in the workplace. On that basis alone, the Board concluded at paragraph 228 that the entire testing regime provided for in the policy – including post incident testing for both drugs and alcohol - was in violation of the collective agreement. The Board noted at paragraph 217 that given its conclusion, it was not necessary to consider the second part of the two step test – that is whether less invasive means could be effective to determine impairment. However, because of the evidence submitted the Board nevertheless went on to opine at paragraph 227 that visual assessment of persons trained for such assessment, together with employee assistance programs was better and less intrusive than testing for eliminating on the job impairment. That was particularly the case in light of the evidence that established that the positive urinalysis test could not confirm impairment.

56. I would observe that the two step test as originally espoused by arbitrator Brent was only applied in *Provincial Truck Transporters* against universal testing and not against reasonable cause, or for that matter, post incident testing. Yet the Board, in *Sarnia Cranes Ltd.*, applied the two steps to invalidate universal, reasonable cause and post incident testing.

57. In *Canadian National Railway* (2000), 95 L.A.C. (4th) 341 arbitrator Picher utilized a balancing of interest approach to determine whether a drug testing policy could be sustained. But he also added that it was appropriate to modify the two step approach to safety sensitive industries so that in a safety sensitive setting such as a railway, as opposed to a bank or other clerical setting, the need of an employer to establish the existence of a drug problem in the workplace before implementing a policy, might be obviated. At pp. 378 of the decision the arbitrator explained his approach as follows:

> As a number of the arbitral awards reflect, it is generally accepted that in analyzing the reasonableness of a drug and alcohol testing policy for the purposes of KVP standards, there may be a burden upon the employer to first demonstrate the need for such a policy, including an examination of whether alternative means have been exhausted. While I do not disagree with those principles, I believe a note of caution should be registered, particularly with respect to that requirement. It seems to the Arbitrator that there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of an employer without first requiring an extensive history of documented problems of substance abuse in the workplace. Few would suggest that the operator of a nuclear generating plant must await a near meltdown, or that an airline must produce documentation of a sufficient number of inebriated pilots at the controls of wide-body aircraft, before taking firm and forceful steps to ensure a substance-free workplace, by a range of means that may include recourse to reasonable grounds drug and alcohol testing. The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-

> safety sensitive work settings, as for example among clerical or bank employees, boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risks for the safety of employees and the public.

58. The arbitrator also specifically rejected the concern expressed by this Board concerning the fact that a positive urinalysis drug test could not confirm impairment. At p. 375-6 the arbitrator explained as follows:

> The only arbitration award of which the Arbitrator is aware which appears to have directly struck down a policy of reasonable cause drug testing is a decision of the Ontario Labour Relations Board in Sarnia Cranes. The reasoning of the O.L.R.B. in support of its decision to disallow for cause or post-accident drug testing, as well as random drug testing, appears to be grounded in the rationale that because urinalysis drug testing is not a perfect instrument, that is to say it cannot conclusively prove impairment at the time the sample was taken, the Company's rule in relation to it is unreasonable by the standards of the KVP decision. With respect, the suggestion that for cause urinalysis drug testing cannot be resorted to because it is an imperfect or limited instrument is a troubling proposition. It is undisputed (and on this issue all of the experts who testified in these proceedings are in agreement) that a positive drug reading does not confirm impairment at the time a urine sample is taken. For that reason any rule which mandates automatic discharge, or any disciplinary consequence, for a positive drug test alone is manifestly unreasonable, by KVP standards, and would clearly run afoul of the just cause provision of a collective agreement. To say, however, that recourse cannot be had to a drug test in reasonable grounds or post-accident circumstances, for broader purposes, such as corroborative value in the face of other compelling evidence of impairment, is highly questionable, and in my view incorrect. No one disputes, moreover, that a negative drug or alcohol test can be useful to conclusively rule out impairment.
>
> .....
>
> While I readily agree with the arbitrator in Sarnia Cranes and the adjudicator in Entrop that the fact that a positive drug test does not prove impairment is a "sticking point", it is only a sticking point to the extent that an employee might be summarily dismissed merely for testing positive. It is not, in my respectful view, a "sticking point" for the arguable purpose of obtaining evidence which may be material and relevant to corroborate other evidence or to be of assistance in the drawing of inferences. (p. 376).

59. As a result the arbitrator upheld the policy's provision for reasonable cause and post incident testing, although other aspects of the policy were invalidated. Notably, the arbitrator determined that that part of the policy which provided that any employee testing positive would be subject to immediate dismissal, was found to be in violation of the collective agreement.

60. With the exception of the *Sarnia Cranes Ltd.* case, policies providing for post incident testing in safety sensitive workplaces have been invariably upheld as a reasonable exercise of management's rights under a collective agreement. This is reflected in the cases relied on by the Responding Party as set out above. Indeed, most recently, the arbitrator in *Sarnia Construction*

Association specifically found that work performed in the petrochemical industry was work performed in a safety sensitive setting. At paragraph 140 of his decision, the arbitrator therefore concluded the following:

> I unhesitatingly accept that realistically, it currently would be inconceivable that construction workers positioned at petrochemical sites would not be subject to "reasonable cause" and "post incident" testing at the insistence of their employers, but with suitable assurance that they are not to be done on any random basis for the category of employees under consideration here.

61. Most recently the Ontario Court of Appeal, in *Imperial Oil Ltd. v.CEP Local 900,* [2009] O.J. No. 2037, upheld a decision of an arbitrator which overturned an employer's policy for random drug testing, but upheld the policy insofar as it provided for reasonable cause and post incident testing. Indeed, that case concerned the same workplace and employer as was previously considered in *Entrop.* In *Imperial Oil,* the employer, following *Entrop,* changed the form of testing from urinalysis, to saliva testing, because saliva testing, unlike urinalysis, could establish impairment. Still the Court prohibited random testing because the employer was unable to establish the need for such an invasive policy. The need for post incident and reasonable cause testing, however, was accepted, particularly in light of the industry concerned – that is, the petrochemical industry.

A. Human Rights Analysis

62. S. 5 of the *HRC* guarantees every employee the right to "equal treatment with respect to employment without discrimination because of … disability". S. 11 of the *HRC* provides a defense to a claim of discrimination where the employer requirement or qualification in question "is reasonable and bona fide in the circumstances". In this context a consideration of drug testing must determine whether the testing discriminated against the disabled in their employment and whether, nevertheless, the testing is otherwise reasonable and bona fide in the circumstances.

63. The leading case on whether drug testing violates the *HRC* (or human rights legislation generally) is *Entrop v. Imperial Oil Limited.* In that case, Entrop worked in a safety sensitive position. He had suffered from drug abuse in the 1980's but at the time of the events giving rise to his complaint, he had not had a drink in seven years. The employer had implemented a drug policy which required employees to disclose past use. He had not, however, disclosed his past drug abuse. When his past drug use became known to the employer, Entrop was reassigned. As a result, he complained to the Human Rights Commission. The Commission referred his complaint for hearing before a Board of Inquiry.

64. The Board broadened the inquiry to consider the employer's entire drug policy and ultimately determined that the policy discriminated against Entrop on the basis of a perceived disability, contrary to s. 5 of the *HRC*. The Board also concluded that random and pre-employment testing violated the *HRC* but that post incident and reasonable cause testing were permissible where the employer could establish it was "necessary as one facet of a larger assessment of drug abuse". (See Court of Appeal decision at para. 99.) This conclusion was upheld by the Divisional Court.

65. On appeal to the Court of Appeal, Mr. Justice Laskin, writing for the Court, concluded that the Board did not have jurisdiction to broaden the inquiry to consider the employer's entire

policy. Nevertheless, the court deemed it necessary to consider and review the Board's conclusions regarding the policy.

66. Following the Supreme Court of Canada's decision in *British Columbia v. B.C.G.S.E.U. (Meiorin)*, [1999] 3 S.C.R. 3, Justice Laskin wrote that a workplace rule (in this case, the drug policy) that was prima facie discriminatory, would nevertheless be in compliance with the *HRC* if it could be established as a BFOR, or bona fide operational requirement. At paragraph 75, Justice Laskin reproduced the three step test adopted in *Meiorin* for determining whether the rule could be justified as a BFOR. To meet the test the employer would have to establish the following:

> (1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

67. At paragraph 89 Justice Laskin indicated the court's acceptance of the Board's finding that those suffering from either substance dependence or substance abuse suffered from a disability ("handicap" within the HRC language at that time) within the meaning of the HRC. At paragraph 92, Justice Laskin further noted that anyone perceived to be suffering from a disability is entitled to protection under the HRC.

68. Beginning at paragraph 99, Justice Laskin determined the maintenance of a workplace free from impairment was a BFOR under the three step test. However the means of ensuring a workplace free from impairment, that is the drug policy, needed to be analyzed separately under the *Meiorin* test. His resulting conclusion was that random and pre-employment urinalysis testing met the first two steps of the test but did not satisfy the third step. That conclusion was reached because the evidence before the tribunal established that urinalysis testing could not confirm impairment. In the words of Justice Laskin at paragraph 99, such testing "provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position."

69. As a result, the Court upheld the Board's conclusion that the policy for random and pre-employment testing violated the *HRC*. But the Court declined to interfere with the Divisional Court's decision upholding post incident testing. Still the Court did not elaborate and specifically evaluate post incident testing under the *Meiorin* test. However, it is at least implicit in the Court's decision that the use of a post incident test as part of an investigation could easily satisfy the third step of the *Meiorin* test as being reasonably necessary to the accomplishment of a workplace free from impairment.

70. Finally, at paragraph 112, the Court specifically concluded that breathalyser testing for alcohol did meet the *Meiorin* three step test so long as accommodations were made for those employees who tested positive.

71. It should be noted that the Board, in *Sarnia Cranes Ltd.*, after concluding that urinalysis testing could not establish impairment, applied the Board's decision in *Entrop* and found that the testing policy in that case also did not meet the three step test for establishing a BFOR because the testing at issue could not confirm impairment. However, the Board applied its decision to post incident and reasonable cause testing for both drugs and alcohol as well as random testing and in that regard, did not make the distinction made by the Court in *Entrop* for reasonable cause and post incident testing and for breathalyser testing for alcohol.

72. Later cases have concluded that policies providing for post incident testing in safety sensitive industries do not violate human rights legislation. For example, in *Greater Toronto Airports Authority*, [2007] C.L.A.D. No, 243 (Devlin), the arbitrator found that random drug testing violated the *Canadian Human Rights Act*. However, the policy's provision for post incident testing was sustained as a BFOR .

73. In *Sarnia Construction Association*, the arbitrator specifically found that that post incident and reasonable cause testing did not violate the HRC. At paragraph 144, the arbitrator noted that it was indeed a BFOR to maintain freedom from impairment in the workplace. The arbitrator then stated "I have no difficulty arising under *Entrop* or *Meiorin* with the formulation of workplace policies speaking to reasonable cause and post incident testing in the ongoing event that the testing does not move into the realm of being random." Indeed, the arbitrator in *Sarnia Construction Association* specifically noted at para. 147 that the Court of Appeal decision in *Entrop* had overtaken *Sarnia Cranes Ltd.*

74. It is apparent that the jurisprudence now accepts the authority of an employer to conduct post incident urinalysis testing in a safety sensitive workplace both as a legitimate exercise of management rights and as a BFOR under human rights legislation, where that testing is conducted as part of an investigation to determine the cause of the incident in question. I agree that a policy providing for such testing constitutes a legitimate exercise of management's authority so long as the testing does not become random.

75. In this case, the policy provides for post incident testing where the impairment of the employee cannot be ruled out as a cause of the incident. That is not a provision for a random test, in my view, but rather a legitimate reservation to conduct a complete investigation to an incident so as better to prevent a recurrence in future. As a result I must conclude that the policy is in compliance with both the collective agreement and the HRC.

Q. 2 Was the Responding Party in compliance with the collective agreement and the HRC in requiring the grievor to submit to a post incident urinalysis drug test in the circumstances of this case?

76. I agree with the proposition that an employer required to investigate the cause of a serious accident or incident should be given some latitude in its ability to determine whether a urinalysis drug test should be conducted as part of its investigation. The evidence established that a urinalysis sample should be taken within two to four hours of the incident, or as close to that as possible, in order for the

results to have value. As set out earlier, the test may be used, along with other factors, to make a determination as to whether or not impairment of the employee was a contributing factor to the incident. Those other factors may not be readily apparent so soon after the incident. But the fact that other factors pointing to impairment may not be readily apparent until some time after the incident should not prevent the employer from being able to conduct a timely test. Rather, where an accident or incident has occurred and where such accident either had resulted in, or has had the potential to result in serious injury or death, or in serious and extensive harm to property, then the employer should be able to conduct a post incident test unless it is immediately apparent that the cause of the incident was something other than impairment.

77. In this case the downing of the overhead wires by the grievor resulted in the loss of power to more than three thousand customers of the power utility. More importantly the electrical current generated through the downed wires could have easily resulted in serious physical injury or even death to the grievor and to other persons who might have been in proximity to the incident. That alone is, in my view, sufficient ground upon which the Responding Party could require the grievor to submit to a urinalysis drug test.

78. But there are additional factors that pointed to the desirability of conducting a test in this case. I would note that the grievor showed admittedly bad judgment in backing up his crane without using a signal person. I would also note the evidence that the grievor initially denied that he hit the wires. In the face of clear evidence to the contrary, it was especially appropriate for the Responding Party to require the grievor to submit to a urinalysis drug test.

79. It is therefore my conclusion that the Responding Party did not violate either the collective agreement or the HRC by requiring the grievor to submit to the test.

Q. 3 Did the Responding Party violate the collective agreement and/or the HRC by treating the grievor's refusal to submit to a test as a positive test result?

80. This aspect of the Responding Party's case causes me some concern. This is important because it is this treatment of the grievor's refusal to test which resulted in the Responding Party's decision to hold the grievor out of service. In the first instance I note that the Responding Party's policy nowhere states that a refusal to test would be treated as a positive test result. More importantly, the inference that the grievor would have tested positive does not take into account the peculiar facts of this case. Those facts include that at the time of the incident, the grievor was relying on his Union's advice that such a urinalysis test was in violation of his human rights. Given the temporal proximity of the incident to the *Sarnia Cranes Ltd.* decision, it was understandable that the Applicant and the grievor would take the view that the Responding Party could not ask for such a test. I do acknowledge that there was other arbitral authority at the time in support of an employer's authority to require post incident testing, but it would not be surprising for this Applicant to rely on the Board's decision in *Sarnia Cranes Ltd.* as it was a decision by this Board pertaining to the same industry, geographic area and collective agreement that governed this Responding Party and dealt with an employer that had been acquired by this Responding Party.

81. In that context, the problem with the Responding Party's actions is that it treated the refusal to test as a positive test result without any considerations of any of the surrounding factors that may have mitigated against that conclusion. It refused to consider the veracity of the reasons for refusing the test. It also refused to consider other factors that may have been relevant to determine

whether the refusal should be treated as the equivalent of a positive test result. Those factors include the long service of the applicant without so much as a single accident or disciplinary blemish on his record.

82. I do not wish to suggest that in no circumstances can a refusal to submit to a lawful request to test by the Responding Party cannot be considered as a positive test. That could be a logical and reasonable inference in other circumstances where the employee could not reasonably believe that he may refuse a request to test. Indeed, as the Responding Party noted in its written submission, Mr. Picher opined in *Canadian Pacific Ltd.* (1997), that a refusal of an employee to submit to a drug test "*may* [emphasis added] leave that employee vulnerable to adverse inferences respecting his or her impairment…" . The arbitrator prefaced that statement by indicating that a refusal to submit to testing may result in such inferences "where good and sufficient ground for administering a drug test do exist". Similarly in *National Gypsum (Canada) Ltd.*, the arbitrator reached the conclusion at p. 380 that "Pursuant to the policy before me *and the evidence* [emphasis added] I am also of the view that a refusal in such a situation is tantamount to a positive test". Still, the arbitrator went on to note that an employee "does … have the right to refuse the test where the Employer has not met the burden of a reasonable suspicion of impairment".

83. Thus even on the authorities relied on by the Responding Party, a refusal to test does not automatically lead to an inference that the employee would test positive. Rather the employer must consider all the surrounding circumstances. Furthermore the employee is entitled, according to these cases, to refuse a test where the employer cannot establish that it had the entitlement to request the test.

84. Perhaps it is unfair and impractical to leave it to the employee to make a determination as to whether a request to test is legal before he/she determines whether to submit. That is particularly so when an employee must make that determination within a short time following the incident. I would note, however, that at the time of the grievor's refusal, this Board had concluded that a predecessor to this Responding Party was prohibited by both the Applicant's provincial collective agreement and the HRC, from conducting reasonable cause or post incident drug or alcohol testing. In light of the state of the law as espoused by this Board in *Sarnia Cranes Ltd.*, and in light of the advice flowing from that decision from the Applicant to the grievor regarding his rights under that decision, the inference that the grievor's refusal to test meant that his test result would be treated as positive, cannot be sustained. In these circumstances, the Responding Party's approach to the refusal amounted to a form of punishment for the grievor's refusal to submit to the test. It also meant that the grievor was treated as a substance abuser although there is no evidence upon which such a conclusion could have reasonably been made. The result was that not only was the grievor held out of service but he was prohibited from returning to work without agreeing to attend substance abuse counselling (which he may not have needed) and future random testing. Such a result may be warranted where there is no reasonable basis to refuse a test. But in these peculiar circumstances I find this result troublesome.

85. That is not to say that the grievor was within his right to refuse the test. He was given an order to test and he refused. The normal "obey now and grieve later" rule might not have applied if I were to ultimately conclude that the Responding Party did not have a right to require a test in this case. I have found, however that the Responding Party did have that right. As a result, by refusing to obey the order the grievor could properly, in my view, have been subjected to some form of discipline for his refusal.

86. The Responding Party relied on Mr. Picher's decision in *J.D. Irving Ltd.*, in support of its submission on this point. In that case part of the drug testing policy challenged by the union was the treatment by the employer of an employee's refusal to test as grounds for immediate dismissal. Mr. Picher refused to rescind that part of the policy. His reasons are set out at p. 347 as follows:

> In any of the foregoing circumstances [where testing is permissible] it is appropriate for the Company to invoke discipline to enforce the employee's obligation to submit to a drug test in appropriate circumstances and to refrain from frustrating or falsifying the completion of documentation or tampering with a test sample. The fact the policy asserts that such actions are "grounds for immediate dismissal" may simply serve as notice to the employees of the Company's view of such actions. In no case however, can this provision be read as overriding the just cause provision of the collective agreement as applied in any particular case.

87. The point to be noted is that a disciplinary response where provided for in the policy may be justified where an employee refuses to test. The case however does not support the treatment of a refusal as a positive test or the holding of an employee out of service, as was done in our case, particularly where the written policy does not provide for such a result. I would also bear in mind that whereas the grievor had wrongfully, but perhaps understandably, thought he had a right to refuse to submit to a drug or alcohol test, he could not have a change of heart without also agreeing to submit to substance abuse rehabilitation counselling and future random testing. Such conditions for a return to work ought not to be sustainable, in my view, in the circumstances of this case.

88. I am therefore forced to conclude that the Responding Party's treatment of the grievor as having tested positive amounted to an unreasonable exercise of its management rights resulting in an unreasonable invasion of the grievor's inherent privacy. It also amounted to discrimination of the grievor on the basis of a perception that he was a substance abuser. As a result, this treatment of the grievor's refusal to submit to testing amounted to a violation of the collective agreement and to a breach of s. 5 of the HRC.

Q. 4 Was the Responding Party's administrative action to hold the grievor out of service under the conditions set by the Responding Party in compliance with the collective agreement and/or the HRC?

89. The answer to this question flows easily from my conclusion on the previous section. Clearly, the Responding Party was unable to draw the inference that the grievor would have had tested positive had he not refuse the test, it has no basis on which to have taken the administrative action under review. It may be, as I have stated previously, that some form of discipline might have been appropriate in response to the refusal to test. However, in all the circumstances keeping the grievor out of service since December, 2004 is not a response that can be justified under the collective agreement. In addition, because the conditions for return to work were designed as a response to individuals suffering from drug abuse, and the grievor was treated as though he suffered from such abuse when the evidence does not establish that, I find that the administrative action also discriminated against him, contrary to s. 5 of the HRC.

Conclusion and Remedy

90. I have concluded that the Responding Party's policy providing for post incident drug and alcohol testing does not violate the collective agreement or the HRC. I have also determined that the Responding Party's decision to require the grievor to submit to such testing following the incident of December 7, 2004, was lawful.

91. However, I have found that in the peculiar circumstances of this case, the Responding Party's treatment of the grievor's refusal to test as equivalent to a positive test result was an unwarranted exercise of its management's rights. It also amounted to discrimination against the grievor on the basis that he was perceived by the Responding Party to have been a substance abuser. The same may be said for the Responding Party's decision to hold the grievor out of service until he completed drug rehabilitation counselling, provided a negative test result and agreed to further random testing. As a result, by holding the grievor out of service in this way, the Responding Party has violated the collective agreement and s. 5 of the HRC.

92. I therefore direct the Responding Party reinstate the grievor into his employment and/or to accept him as an employee when supplied by the Applicant in accordance with the collective agreement and its hiring hall rules.

93. In this decision I have indicated that the Responding Party would have been entitled to further discipline the grievor for refusing to submit to testing as requested. For this reason and for other reasons which need not be delved into at this time, it is not readily apparent what, if any, compensation the grievor should be entitled to as a result of this award. I therefore remit the question of compensation back to the parties and remain seized to make a determination on compensation if the parties are unable to agree.

0077-09-U The United Brotherhood of Carpenters and Joiners of America - Local 446, Applicant v. **The United Brotherhood of Carpenters and Joiners of America**, Responding Party v. Greater Ontario Regional Council of Carpenters and Drywall & Allied Workers on its own behalf and on behalf of its constituent local unions, Intervenor

Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Local 446 alleged that its parent union, UBCJA, improperly altered its jurisdiction by merging it with another local – The Board addressed the factors set out under s. 147(3) and found that: the process used by UBCJA was acceptable in that it complied with its constitution and comported with the Act; Local 446 was no longer a viable local union, whereas its merger would allow for the pooling of resources; and the merged local would be stronger financially and have more resources to allocate to organizing, training and servicing the increased membership without creating any serious labour relations problems – The Board found that the UBCJA's decision was not only a fair and reasonable one in all the circumstances, but it was fully justified – Application dismissed

BEFORE: *Jack J. Slaughter*, Vice-Chair.

APPEARANCES: *Gord Acton, Bruce Willson* and *Fred Clement* appearing for the applicant; *Harold Caley* and *Jim Smith* appearing for the responding party; *Harold Caley* and *Don Guilbeault* appearing for the intervenor.

DECISION OF THE BOARD; December 31, 2009

1. This is a complaint filed under section 96 of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended (the "Act"), which alleges violations of sections 147 and 149 of the Act. More specifically, United Brotherhood of Carpenters and Joiners of America, Local 446 ("Local 446") asserts that its parent union, United Brotherhood of Carpenters and Joiners of America (the "UBCJA") has improperly altered its jurisdiction by directing that it be merged into United Brotherhood of Carpenters and Joiners of America, Local 2486 ("Local 2486"). Essentially, the Carpenters' Sault Ste Marie local union is objecting to being merged into the Carpenters' Sudbury local union. The Greater Ontario Regional Council of Carpenters ("GORC"), of which both Locals 446 and 2486 are constituent members, has intervened to support the UBCJA's decision to merge the two local unions.

2. Sections 147 and 149 of the Act read as follows:

> **147.** (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.
>
> (2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.
>
> (3) On an application relating to this section, the Board shall consider the following when deciding whether there is just cause for an alteration:
>
> 1. The trade union constitution.
>
> 2. The ability of the local trade union to carry out its duties under this Act.
>
> 3. The wishes of the members of the local trade union.
>
> 4. Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems.
>
> (4) The Board is not bound by the trade union constitution when deciding whether there is just cause for an alteration.
>
> (5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.

***

> **149.** (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.
>
> (2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.
>
> (3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.
>
> (4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

3. The Board held a consultation in this matter on September 4, 2009, during which it entertained full submissions from all parties. At the consultation, the UBCJA produced a document describing Local 446's purported organizing activities since 2002. Local 446 then stated it was not in a position to agree or disagree with the contents of the document at that time. Therefore, the Board directed that the parties file further submissions only with respect to the accuracy and import of this document. Notwithstanding the Board's direction, Local 446's submission contained not only representations about its organizing activities but a letter from Fred Clement, President of Local 446 who claimed he "was not permitted to speak at the hearing". That claim is incorrect. Local 446 was represented by counsel at the consultation and was free to make any submissions it wished to make, including having Mr. Clement address the Board (but not including the presentation of evidence under oath which would be subject to cross-examination). In any event, Mr. Clement's letter reiterates submissions that are already before the Board. The UBCJA filed reply submissions that addressed the issues for which the Board requested submissions, but did not attempt to go further than that.

4. Additionally, at the consultation, Local 446 urged the Board not to decide this matter by way of consultation but requested that the Board hold a full hearing to enable it to adduce *viva voce* evidence. The Board inquired as to what evidence Local 446 wished to call. Counsel for Local 446 stated that he wished to call Mr. Clement to testify with respect to conversations he had with members of Local 2486's Executive Board and their attitude towards the merger. The Board finds it unnecessary to hear this evidence. For the purpose of this application, the Board will assume that some members of Local 2486's Executive Board advised Mr. Clement that they did not support the merger of the two locals. Having said that, the Board finds that it is able to determine this matter based on the assumption just identified, the representations of the parties, and the substantial documentary information before it.

OVERVIEW

5. Local 446 is challenging the March 16, 2009 decision of UBCJA General President Douglas McCarron to dissolve Local 446, and to order its merger into Local 2486. Local 446 says this merger fails to meet the "just cause" requirements of sections 147 and 149 of the Act.

6. All parties agree that the test to be applied to the UBCJA's decision is the one first articulated in *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Feb. 70, and followed in *International Union of Bricklayers and Allied Craftworkers*, [2000] OLRB Rep. Jan./Feb. 70 and *United Brotherhood of Carpenters and Joiners of America*, [2001] OLRB Rep. March/April 491. That test is very simply and elegantly expressed:

> Was the parent union's decision a fair and reasonable one having regard to all of the circumstances?

7. In this case, the UBCJA and GORC say the answer is "yes", while Local 446 maintains that the answer is "no". The Board's task is to determine the right answer in view of the information and representations before it.

BACKGROUND AND STRUCTURE OF THE CARPENTERS' UNION

8. The UBCJA is an international trade union which was first organized in 1881 by Peter J. McGuire. An Ontario branch of the UBCJA was established as Local 18 in the Hamilton area in 1882. Many other local unions were subsequently chartered by the UBCJA throughout North America to represent carpenters, drywallers, millwrights and other workers. For many decades, the UBCJA has had three local unions representing carpenters in northern Ontario: Local 446, based in Sault Ste. Marie with geographic jurisdiction over most of Board Area No. 21; Local 2486 based in Sudbury, with geographic jurisdiction over Board Areas 16, 17, 19, 20, 25, 32 and Townships in northeastern Ontario not included in any Board Area; and Local 1669 with jurisdiction over Board Areas 22, 23, 24 and part of Board Area No. 21.

9. In 1995, elections were held for the UBCJA's General Executive Board. Successful candidates included General President Doug McCarron and James Smith, who would become Vice-President, Canada. Both Messrs. McCarron and Smith were elected with a mandate to revitalize the UBCJA, to improve organizing, to increase market share, and to improve service to the membership. The Board summarized the approach of the new General Executive Board in *United Brotherhood of Carpenters and Joiners of America supra*:

> 15. The General Executive Board adopted a resolution that fifty percent of revenues of the International Union were to go back into the field in the form of organizing grants. Thus, the International looked inwards to determine where cuts could be made to free up resources that could be redirected to organizing efforts. The International cut its staff of 250 by 100 and subsequently made even further cuts. The General Executive Board went from 15 members down to nine. Printing, and management of the pension plan, were outsourced. The building that housed the International was torn down and rebuilt in order to accommodate tenants that generate 12 million dollars a year in revenue for the International. Various other cuts were

> implemented that together achieved savings of between 20 and 25 million dollars a year.
>
> 16. At the local level, the General Executive Board believed that there were too many locals and that too many locals operated in an inefficient manner. It was felt that considerable administrative savings could be achieved if regional councils were established. The savings would be redirected into organizing efforts. In addition, the new regional councils were intended to reflect an increasingly regional marketplace and establish uniform hiring hall practices in large geographic areas. A further aim was to have centralized financing which would result in the ability to provide the members with better training opportunities and improved service.

10. Since 1995 the UBCJA has moved forward to implement its policy through merging small inefficient local unions into larger more effective ones, and creating regional councils. While the UBCJA has been largely successful in achieving its goals, it has also encountered considerable opposition along the way. Sometimes it has been able to create regional councils and larger local unions by consensus, and other times fiercely contested litigation has ensued.

11. In Ontario, the UBCJA established the Central Ontario Regional Council ("CORC") on December 1, 1997. It was comprised of Toronto based Locals 27 (general carpentry) and 675 (drywall), Cambridge based Local 785, and the then Lake Ontario District Council (the "LODC") made up of four small local unions based in Oshawa, Belleville, Cobourg, and Peterborough. The UBCJA's actions were challenged by the LODC before this Board and upheld. The UBCJA's decision to create CORC was found by this Board not to contravene sections 145, 147 and 149 of the Act because it yielded a result that was fair and reasonable: *United Brotherhood of Carpenters and Joiners of America supra*.

12. On February 1, 2002, the UBCJA established the Greater Ontario Regional Council ("GORC"). Its constituent members have included Locals 446, 2486, 1669, 18, 93 (Ottawa – general carpentry), 249 (Kingston), 494 (Windsor), 1256 (Sarnia), 1946 (London), 1988 (Smith Falls), 2041 (Ottawa – drywall), 2222 (Goderich), and 2000 (Ottawa – industrial). In 2006, Local 1988 was merged into Local 249. Neither the creation of GORC nor the merger of Local 1988 into Local 249 has been the subject of a challenge that has required a decision of this Board to resolve differences between the affected parties.

13. By letter dated June 26, 2008, addressed to General President McCarron, GORC requested that Local 446 be dissolved and merged into Local 2486, and provided reasons in support of its request. That letter set in motion the instant dispute, culminating in UBCJA General President McCarron's decision of March 16, 2009 to merge the two local unions.

14. There is no issue that the proposed merger of Local 446 into Local 2486 amounts to an alteration of the jurisdiction of Local 446 within the scope of section 147 of the Act. Therefore, the Board will now move to analyze whether the UBCJA had just cause for the decision to make such an alteration with reference to the factors set out in subsection 147(3) of the Act. Then the Board will examine the application of section 149 of the circumstances of this case.

THE STATUTORY FACTORS UNDER SUBSECTION 147(3) OF THE ACT

(A) Process Issues and the UBCJA Constitution

15. In its written submissions, Local 446 alleges that "we were told" a decision was made in 2002 to revoke Local 446's charter by Mr. Smith at a meeting held with GORC representatives on April 16, 2008. This submission is of dubious credibility. The Board finds it most unlikely that a decision to revoke Local 446's charter made in 2002 would not have been acted upon or communicated to anyone for six years. There is nothing in the UBCJA's materials relying upon any event in 2002 other than the creation of GORC. Similarly, the UBCJA does not rely on anything said or done at the April 16, 2008 meeting. The UBCJA does agree the meeting took place and a discussion about Local 446 occurred. The Board does not believe Mr. Smith made the alleged statement, as it makes no sense. Most likely Mr. Smith was commenting on the pattern of reorganizing the UBCJA underway since 1995, and saying the creation of GORC in 2002 was part of that ongoing story. In any event, absolutely nothing was decided at that April 16, 2008 meeting.

16. Following GORC's letter of June 26, 2008, Mr. Smith considered its contents, and then prepared a draft letter to General President McCarron recommending the merger of Local 446 into Local 2486. By letter dated September 19, 2008, he requested representatives of GORC, Local 2486 and Local 446 to advise him in writing by October 3, 2008 "if there are any other issues for consideration before I make my final recommendation".

17. Local 446 chose not to provide Mr. Smith with any issues for his consideration. Instead, on September 30, 2008, Local 446 wrote to Mr. Smith stating it was in opposition to the merger with Local 2486, and to Mr. McCarron requesting a "reasonable period of time" to respond to Mr. Smith's "recommendation which is opposed by our membership". The Board notes that in fact Mr. Smith had not made any recommendation to Mr. McCarron at this time, although he had given notice to GORC, Local 446 and Local 2486 of his intended recommendation, and afforded them with an opportunity to provide him with further information that could alter or affect his recommendation.

18. By letter dated October 21, 2008, Mr. Smith reiterated to Local 446 that Local 446 should advise him in writing if there were other issues for his consideration before he made his final recommendation to Mr. McCarron.

19. By letter dated October 28, 2008, Local 446 declined to do so, alleging "your mind is already made up and there is nothing further we could add that would change your position".

20. By letter dated November 7, 2008, Mr. Smith advised Local 446 that the UBCJA's general practice with respect to merger requests is to have the Vice President review the request, make a recommendation based on that review, and forward the recommendation with all the associated documents to the General President for his decision. Mr. Smith's avowed intention was to ensure Local 446 had "every opportunity to make submissions". However, Mr. Smith conceded Local 446 was not going to reply to him and instead instructed Local 446 to submit its submissions directly to Mr. McCarron by November 28, 2008.

21. By letter dated November 10, 2008, Local 446 harshly criticized Mr. Smith and stated it had "no intention of contributing to the myth you wish to create that we can get a fair hearing from

you". Local 446 indicated it wished to see Mr. Smith's final recommendation, and then would write to Mr. McCarron.

22. By letter dated November 26, 2008, Mr. Smith recommended the merger of Local 446 into Local 2486 "unless Local 446 has some compelling reasons to the contrary".

23. By letter dated November 27, 2008, Local 446 wrote to Mr. McCarron and requested it be given until January 31, 2009 to make its argument against the proposed merger.

24. By letter dated December 8, 2008, Mr. McCarron established the deadline for Local 446's submissions to be January 16, 2009.

25. Local 446 filed extensive submissions with the UBCJA on January 6 and 16, 2009.

26. In a letter dated March 16, 2009, General President McCarron advised that he had considered Local 446's submissions and found they indicated improvements in several areas on the part of Local 446. However, it was his view and decision that it was in the best interests of the UBCJA and its members to merge Local 446 into Local 2486.

27. Local 446 argues that the process followed by the UBCJA is fatally flawed. Local 446 asserts that Mr. Smith's mind was already made up, and that Mr. McCarron failed to accord Local 446 natural justice by failing to hold a hearing before approving the merger. Furthermore, Local 446 claims that Mr. McCarron's letter of March 16, 2009 does not address the competing facts, which demonstrates he did not decide the merger issue having regard to all the appropriate considerations.

28. The Board does not accept any of those arguments with respect to the process followed by the UBCJA.

29. Firstly, the Board does not agree that the materials before the Board prove Mr. Smith had pre-decided the merger issue. To the contrary, Mr. Smith repeatedly urged Local 446 to provide him with its submissions in support of its position. Mr. Smith's requests to this effect were repeatedly rebuffed, often in strongly critical language, by Local 446. In any event, it was Mr. McCarron who made the final decision, and there is no allegation before the Board that he had pre-decided the issue.

30. Moreover, Local 446's submission on natural justice is misguided. In deciding whether to approve the merger or not, the UBCJA's General President is not exercising a quasi-judicial function. Rather he is exercising an administrative power of decision under the UBCJA Constitution. The relevant provision is Article 6A of the UBCJA Constitution, which provides as follows:

> **JURISDICTION**
>
> **A** Section 6. The jurisdiction of the United Brotherhood of Carpenters and Joiners of America shall include all branches of the Carpenter and Joiner trade, the industrial sector, and any kind of work being performed by any members of the United Brotherhood. In it shall be vested the power through the International Body to establish and charter subordinate Local and Auxiliary Unions, District, State and Provincial Councils in all branches of the trade, and its mandates must be observed and obeyed at all times.

In view of technological developments and industrial diversification, no type of employment category shall be excluded from the jurisdiction of the United Brotherhood, whether or not spelled out in Section 7.

The United Brotherhood is empowered, upon agreement of the Local Unions and Councils directly affected, or in the discretion of the General President subject to appeal to the General Executive Board, where the General President finds that it is in the best interests of the United Brotherhood and its members, locally or at large, to establish or dissolve any Local Union or Council, to merge or consolidate Local Union or Councils, to establish or alter the trade or geographical jurisdiction of any Local Union or Council, to form Councils and to permit, prohibit or require the affiliation with or disaffiliation from any Council by any Local Union, including the right to establish statewide, province wide and regional Local Unions or Councils having jurisdiction over specified branches or subdivisions of the trade. The vested rights of the members shall be preserved and where action as herein described is taken, the General President and General Executive Board shall preserve the membership rights of the members of affected Local Unions, including their right to attend and participate in meetings, to vote, to nominate candidates and to be nominated and run for office or business representative. In connection with the foregoing, the General President may, upon finding it appropriate, appoint a committee to hold hearings upon due notice to directly affected Local Unions or Councils, and make finding and recommendations.

••••

D The United Brotherhood of Carpenters and Joiners of America shall have the right to establish supervision over and to conduct the affairs of any subordinate body (including the removal of any or all officers of such subordinate body) to correct financial irregularities or to assure the performance of collective bargaining agreements and the responsibility of the subordinate body as a bargaining agent or to protect the interests and rights of the members or whenever the affairs of the subordinate body are conducted in such a manner as to be detrimental to the welfare of the members and to the best interests of the United Brotherhood, subject, however, to the provisions of Paragraph H of Section 10. The authority granted to the United Brotherhood herein includes the authority to establish supervision to prevent secession or disaffiliation by any subordinate body or bodies.

••••

H The General President may authorize and charter Regional Councils to be composed of two or more Local Unions and/or District Councils. There shall be a Canada Council, with Bylaws to be approved by the First General Vice President.

I The General Executive Board may establish uniform Bylaws to govern State Councils, Provincial councils, Regional Councils, Industrial Councils and Industrial Local Unions, not inconsistent with the Constitution and Laws, which shall be in full force and effect pending ratification or modification by the next General Convention.

31. The Article clearly provides that the General President "may" appoint a committee to hold hearings in the course of deciding whether to dissolve or merge local unions. Therefore, a hearing is not required in every case. It is open for the General President to make his decisions based upon written submissions, as was done here. This does not contravene the principles of natural justice, which may be described in the simplest terms as "the right to be heard". Local 446 was given a full opportunity to make whatever submissions it wished to make. The General President considered those submissions, but did not find them convincing. That is sufficient to meet the requirements of natural justice in the circumstances of this case. Whether the General President's decision was "fair and reasonable" is a separate question, which will be considered below.

32. In any event, the statutory language found at sections 147 and 149 of the Act contemplates that a parent trade union may fail to abide by the procedural requirements of natural justice and yet still satisfy the just cause standard: *International Union of Bricklayers and Allied Craftworkers supra*; *United Brotherhood of Carpenters and Joiners of America supra*. In this case, as in *United Brotherhood of Carpenters and Joiners of America*, the UBCJA complied with Article 6A of its Constitution by obtaining a report from the Vice-President, and consultation submissions from the affected local union. Therefore, the process followed by the UBCJA is acceptable and comports with clause 1 of subsection 147(3) of the Act. The Board will now examine the remaining statutory factors.

(B) The Ability of the Local Trade Union to Carry Out Its Duties Under the Act

33. Arguably this is the most important criterion. Whether the UBCJA's decision is a fair and reasonable one in all the circumstances is an issue that turns largely on whether General President's McCarron's assessment of Local 446's ability to carry out its duties under the Act was a fair and reasonable assessment.

34. In order for the Board to decide this issue, it is necessary to consider the facts and arguments Mr. McCarron had in his possession at the time he made his decision on March 16, 2009. On one side, he had the facts and arguments presented by GORC and on the other side he had the rebuttal from Local 446. Local 2486 elected not to make any submissions or provide any materials of its own to the General President.

35. GORC made a number of arguments. GORC submitted that Local 446's membership level was low and had remained low, standing at 156 members in 2003 and 169 in 2007. The average age of a member of Local 446 was 50, as contrasted with the average age of a member of Local 2486 at 33. From 2003 to 2007, Local 446 did virtually no organizing: zero certifications and only six voluntary recognition agreements. Due to economic and climatic factors, members of Local 446 did not work throughout the year. From 2002 to 2007, the full-time positions actually worked varied from a low of 31 members in 2002 to a high of 69 members in 2005, with the number subsiding to 57 members in 2007.

36. GORC asserted that Local 446's income was insufficient to cover the costs of employing a full-time business representative. Its numbers were far below that of the next smallest local union, being Local 2222 in Goderich. The data also reflected a paucity of jobs in the area, limited apprenticeship and upgrading training, and a general lack of activity to occupy then Business Representative Gil Scott.

37. GORC submitted that there were a number of reasons favouring a merger of Locals 446 and 2486. GORC said there is now a single construction market for contractors based in Sault Ste. Marie, Sudbury and North Bay, such that Local 2486 contractors perform much of the work in Local 446's jurisdiction. GORC pointed out a larger local union would achieve cost savings, enabling the devotion of greater resources to organizing and training, and enhancing the job opportunities for Local 446's current members. In total, GORC stated that "one integrated jurisdictional area" was in the best interests of Local 446 and Local 2486.

38. In its correspondence of January 6 and 16, 2009, Local 446 sought to rebut the points made by GORC. Local 446 asserted its membership had grown substantially between October 2007 and January 2009. Local 446 asserted it was expanding its market through organizing and had "negotiated a new Power Sector agreement and [was] negotiating a Residential agreement". Local 446 said it had opened a new training centre and was expanding the scope of its training. As a solution to its difficulties, Local 446 recommended expanding its geographical boundaries to include Elliot Lake, which would "result in a greater efficiency to the Brotherhood".

39. The Board has had the opportunity to examine the competing arguments and the documentary materials submitted by the opposing sides. The overall results provide a compelling case supporting the fairness and reasonableness of the UBCJA's decision to approve the merger.

40. Firstly, there is no question that the membership of Local 446 is low and has remained low. There is nothing in the materials before the Board to contradict the UBCJA's assertion that the membership of Local 446 varied from a low of 156 active members in 2002 to a high of 169 active members in 2007. Likewise, the UBCJA's calculation of Local 446 having average full-time positions varying from a low of 31 members to a high of 69 members between 2002 and 2007 is not disputed. These numbers are not the numbers of a sustainable local union. Even if one looks to the membership totals provided by Local 446, which include retired and inactive members, its highest membership level as at October 17, 2008 is 214 members, a figure well below the next two smallest locals: Local 2222 (Goderich) with 321 members, and Local 1946 (London) with 423 members.

41. The training numbers, until very recently, have been equally poor. Uncontested figures for the first half of 2007 record no new drywall apprentices, and one third-term carpenter apprentice. Overall in the same period there were only three total drywall apprentices (all sixth term) and twenty total carpenter apprentices (four second term, two third term, fourteen fourth term). In this time period, Local 446 had *no* pre-apprentices or first-term apprentices at all. The numbers dramatically improved after GORC indicated it wished to merge Local 446 into Local 2486.

42. Now the Board will look at the organizing data. From 2002 until October 2003, Local 446 organized *no* employers. It signed two voluntary recognition agreements in 2005, one in 2006 and one in 2007 – all for the ICI sector. During this period it certified *no* employers. In 2008, Local 446 obtained two certificates but signed no voluntary recognition agreements. No new employers were organized in 2009 prior to the General President's decision in March 2009, although at least one certificate and two voluntary recognition agreements were obtained by Local 446 thereafter. Local 446's allegation it had a new "Power Sector" agreement was not substantiated, nor was there any residential agreement in place before March 2009.

43. A review of the Local 446 Business Representative Jobsite Inspection Reports is also informative. They were submitted by the UBCJA and not challenged by Local 446. An examination

of the projects recorded from 2005 to 2007 yields the following results: thirteen union projects and thirteen non-union projects. Of the sixteen unionized contractors performing work on the projects, seven were based in Local 446's geographic area, two were based in Local 2486's geographic area, and seven were based elsewhere in Ontario or in the United States. Ten projects were operating on a non-union basis. Therefore, the objective data on file does not support the contention of GORC and the UBCJA that one central market has developed for construction services in northern and northeastern Ontario. Nor does the data support there being an isolated group of local area contractors which perform the work. Rather it appears that Local 446's geographic area is serviced by Local 446 based contractors, Local 2486 based contractors, and out of area contractors ("Provincial Contractors"). This is perhaps not surprising, given improvements in roads and other modes of transportation, and given the emphasis in Local 446's geographic jurisdiction of large-scale projects in the steel and fibre industries. It would also appear that the Provincial Contractors actively bid on large-scale commercial and institutional projects, such as hospitals, schools, and government buildings. The fairest conclusion is that Local 446 has a separate market from that of Local 2486, but it is a market serviced by Provincial Contractors, Local 446 based contractors and Local 2486 based contractors.

44. Furthermore, a great deal of construction carpenters' work was being done on a non-union basis. Ten surveyed projects were non-union. No heavy engineering or residential agreements were in place, and no organizing apart from a few voluntary recognition agreements was being undertaken in any sector of the construction industry. Market share and work opportunities for Local 446's membership were low.

45. All the unionized work in the relevant period was performed under the ICI Agreement. There were no local collective agreements in play. Nor did Local 446 demonstrate how its representatives would administer the province-wide ICI Agreement in any different manner than any other local union such as Local 2486, given the common Master Portion and relatively straightforward local area appendices of the ICI Agreement.

46. When all the information is taken into consideration, it is clear that Local 446 as it existed at the time of General President McCarron's decision of March 16, 2009 was a local union struggling to properly carry out its duties under the Act. Prior to the suggested merger, its membership was low, its organizing was minimal, and its training and apprenticeship initiatives were scant. The average age of its membership was 50, and it was not replenishing its membership in any meaningful way through organizing or training new members.

47. It strikes the Board that General President McCarron's letter correctly assessed the situation as at March 16, 2009. A new training centre was opened in 2008, and membership in Local 446 did increase. Organizing remained virtually non-existent with no voluntary recognition agreements signed and only two certifications obtained in 2008 and early 2009 (which did not result in any remittances being received by Local 446). Local 446 was showing improvement – but not enough to make it a viable local union. The merger of Local 446 into Local 2486 will allow for the pooling of resources to enhance organizing, training and servicing that will bring in new members and allow the new larger local union to sustain itself and serve the interests of its members and the UBCJA.

48. This factor favours a finding that the decision of the UBCJA was a fair and reasonable one.

THE WISHES OF THE MEMBERS OF THE LOCAL TRADE UNION

49. Local 446 submits that it held a membership meeting where the members in attendance were "unanimously opposed" to the merger. There is no evidence of any opposition to the merger on the part of the membership of Local 2486, other than the evidence Mr. Clement wishes to give. For the purposes of the discussion, the Board will assume some members of Local 2486, including some members of its Executive Board, are opposed to the merger.

50. It is not surprising, and indeed to be expected, that members of a smaller local union will object to being swallowed up into a larger local union. They fear the loss of familiar structures, loss of a degree of control, and a dwindling influence over the local union's affairs. These concerns are legitimate, but they need not come to pass. A newly merged local trade union will have to represent all its members in accordance with the duties of fair representation and fair referral prescribed by the Act.

51. This is not to say that the wishes of the members of the local union are not to be taken into account. They are a relevant factor. However, those wishes are not controlling, for the reasons explained in *Laborers' International Union of North America* 2000 CanLII 12252 (ON L.R.B.):

> The "Bill 80 amendments" were added to the Act in 1993, and focus on the internal affairs of *construction trade unions*. Those amendments do not foreclose a sensible restructuring of such unions to meet the collective bargaining challenges that they face. Construction trade unions are not frozen in the form that existed at the time that the statute was amended. Nor do local minorities have a statutory veto over trade union reorganization. On the other hand, the Bill 80 amendments do require a parent union to have "just cause" for any proposed changes, and prevent a parent union from using its institutional or constitutional clout to penalize Local unions that question the parent's authority, or seek to preserve their local autonomy.
>
> The Board's job, therefore, is to balance these competing factional and institutional concerns, within the framework provided by the statute.

52. The wishes of the membership of Local 446 are to be taken into account, but do not constitute independent proof the UBCJA's merger decision was not a fair and reasonable one.

WHETHER THE ALTERATION WOULD FACILITATE VIABLE AND STABLE COLLECTIVE BARGAINING WITHOUT CAUSING SERIOUS LABOUR RELATIONS PROBLEMS

53. With respect to this factor, Local 446 asserts that Local 2486 based contractors only perform 2% of the total hours of work performed within Local 446's geographic jurisdiction. Furthermore, Local 446 says Local 2486 would bring weaker trade jurisdictional practices upon the members of Local 446 in areas such as the stripping of formwork and drywall taping. Local 446 says it would be disruptive for its local area employers to have to deal with a new local union. Local 446 also submits that the other building trades unions have experienced a distinct lack of success from merging the "former Sault locals" into "locals that are managed out of Sudbury from the benefit of Sudbury".

54. The Board does not find Local 446's arguments to be persuasive with respect to this factor. The Board agrees that GORC and the UBCJA have exaggerated the extent of work performed by Local 2486 based contractors in Local 446's geographic jurisdiction. The actual percentage is not material for present purposes, and need not be determined now. What is more relevant, as was described above, is that Local 446's market is serviced by Provincial Contractors, and not just local contractors.

55. Local 446's arguments about disruption to local contractors and jurisdictional practices can be dealt with directly. Local 446's organizing efforts and market penetration up to the time of General President McCarron's decision were abysmal. No collective agreements were in place other than the provincially negotiated ICI and electrical power systems ("EPSCA") collective agreements. Much of the work being performed under those collective agreements was being performed by Provincial Contractors. The Carpenters' ICI Collective Agreement has a common Master Portion and Local Area Appendices. Local 2486 representatives would be familiar with administering the Carpenters ICI Collective Agreement, the EPSCA Collective Agreement, and dealing with provincial contractors. There is no valid reason to fear serious labour relations problems with local area contractors. There is no evidence of any opposition to the merger from the Sault Ste. Marie Construction Association or any individual employer. The trade jurisdictional argument does not hold water in light of the poor organizational base and market share of Local 446. It is Local 2486 that has the greater market share and membership, not the other way around.

56. Finally, the argument of Local 446 about other building trades unions' practices does not assist it. Rather, it has quite the opposite effect. The fact that the Electrical Workers, Sheet Metal Workers and Painters Unions have merged their Sault Ste. Marie local unions into their Sudbury local unions supports the premise that the UBCJA's decision is a fair and reasonable one in accordance with patterns developing in the construction industry. Moreover, as discussed with the parties at the hearing, other trade unions with province-wide locals have successfully serviced their Sault Ste. Marie members for many years, such as the Operating Engineers, the Insulators and the Boilermakers.

57. Therefore, the Board does not believe the merger would create any serious labour relations problems. On the other hand, the Board finds merit in the arguments of GORC and the UBCJA that an expanded Local 2486 would be stronger financially and have more resources to allocate to organizing, training and servicing the increased membership.

58. The factor favours a finding that the UBCJA's decision to alter Local 446's jurisdiction was a fair and reasonable one.

CONCLUSION ON SECTION 147

59. The Board has considered the statutory factors enumerated in subsection 147(3) of the Act. The UBCJA followed the requirements of its constitution in arriving at its decision to dissolve Local 446 and to merge it into Local 2486. The evidence before both the UBCJA and this Board overwhelmingly demonstrates that the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems, and would be in the best interests of the UBCJA and the members of Locals 446 and 2486, despite the opposition expressed by the membership of Local 446. The UBCJA's decision was accordingly, "a fair and reasonable one in all the circumstances". Therefore, there is no violation of section 147 of the Act.

60. In so deciding, the Board notes that Local 446 has "a long history dating back to 1917" and is the third largest Carpenters' local union in Ontario by geographic area. At one time, no doubt the existence of Local 446 made perfect sense. However, we live in an ever changing world. Great corporate names such as Studebaker, Lehman Brothers and Eaton's are no longer with us. Time marches on. The UBCJA is entitled to, and indeed should, take the steps necessary to ensure the survival and success of the UBCJA and its constituent local unions. On all the facts before the Board, Local 446 fell well below the standards of a viable local union as of March 2009, and the UBCJA's decision to merge it into an adjoining local union to ensure the viability and sustainability of the enlarged local union is not only fair and reasonable, but is fully justified. It is consistent with the UBCJA's ongoing plan to revitalize itself.

SECTION 149

61. The parties directed very little time to this section in argument. The UBCJA has not assumed supervision or control over Local 446 on the facts of this case. The Board is prepared to find that the proposed merger of Local 446 into Local 2486 constitutes "interference" in such a way that "the autonomy of the local trade union is affected".

62. However, for the reasons given above, the UBCJA had just cause for that interference. Therefore, there is no violation of section 149 of the Act either.

63. This application is accordingly dismissed.

2353-08-M; 0609-09-U; 1441-08-U The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Mechanical Contractors Association Ontario, and Procon Niagara, a division of 1149855 Ontario Inc., Applicants v. **V.K. Mason Construction Co.**, International Brotherhood of Electrical Workers Construction Council of Ontario, Lincoln, Welland, Haldimand Building and Construction Trades Council, Brick and Allied Craft Union of Canada, Local 4/Marble Tile and Terrazzo Workers, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 303, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 837, Ontario Building and Construction Trades Council, International Brotherhood of Painters and Allied Trades, Local 1795 (Glaziers), International Union of Elevator Constructors, Local 90, Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598, Sheet Metal Workers International Association, Local 537, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, Refrigeration Workers, United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 666, United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 853 (Sprinkler), and United Brotherhood of Carpenters and Joiners of America, Local 1007 (Millwrights), Responding Parties v. Crane Rental Association of Ontario, Intervenor v.

Electrical Power Systems Construction Association, Intervenor v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor; The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, and Procon Niagara, a division of 1149855 Ontario Inc., Applicants v. V.K. Mason Construction Co., International Brotherhood of Electrical Workers, Local 303, and Vipond Inc., Responding Parties v. Lincoln, Welland, Haldimand Building and Construction Trades Council, Intervenor; Mechanical Contractors Association Ontario, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 666, Responding Party

Bargaining Rights – Sector Determination – Applicants sought a determination under s. 166 as to whether or not the Thorold Project properly fell under the ICI or the electrical power systems sector of the construction industry – The Thorold Project involved the construction of a Co-Generation facility that would generate steam to be used in the operation of the paper mill and in the production of electrical power – After reviewing the Board's history of dealing with the line between the ICI and EPS sectors, the Board considered the end use of the construction, the work characteristics of the project, and the bargaining patterns of the parties on this and similar projects – The Board found that there were two end uses for the facility, to produce steam for use both in paper making (ICI) and the generation of electricity (EPS), neither of which was predominant – The Board found that there were no work characteristics which distinguished the Project overall from those in the ICI or EPS sectors – Finally, the Board noted that the vast majority of similar types of projects had previously been built using Provincial Collective Agreements in the ICI Sector – For these types of projects, there was no new or different bargaining structure created by the parties – Since the first two factors were inconclusive regarding sector, the bargaining pattern was determinative – The Board held that the Thorold Project fell within the ICI sector of the construction industry.

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Scott G. Thompson* and *Eryl M. Roberts* for The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and Procon Niagara, a division of 1149855 Ontario Inc.; *Michael Horvat* for Mechanical Contractors Association Ontario; *Hendrik Nieuwland* and *Jean-Phillipe David* for V.K. Mason Construction Co.; *April Brousseau* for the International Brotherhood of Electrical Workers Construction Council of Ontario; *Denis Ellickson* for the Lincoln, Welland, Haldimand Building and Construction Trades Council; *Jesse Nyman, Ian McIsaac* for the Millwright Regional Council of Ontario; *Jesse Nyman* and *Mike Yorke* and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America,; *M. Patrick Moran, Ron Martin* and *Ivars Starasts* for the Electrical Power Systems Construction Association; *L.A. Richmond* and *H. Bartlett* for Labourers' International Union of North America, Ontario Provincial District Council.

DECISION OF THE BOARD: December 9, 2009

Introduction

1. This is an application under section 166 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended ("the Act") in which the applicants seek a determination as to which sector of the

construction industry the Thorold Cogeneration Project ("the Project" or the "Thorold Project") falls. The Project is situated on land owned by Abitibi Consolidated and is connected physically and operationally to its paper mill. The builder and owner of the Project is Northland Power. The Project is the construction of a Co-generation facility (or "Co-gen") that will generate steam to be used in the operation of the paper mill and in the production of electrical power.

2. The Project is described in a 2007 press release as follows:

> ...
>
> The plant is being built at the Abitibi-Consolidated Company of Canada Thorold Recycled Paper Mill. When completed, the Thorold Cogeneration Plant will supply enough electricity to power the equivalent of 100,000 homes in Ontario under a 20-year electricity supply contract with the Ontario Power Authority. In addition, the 265 megawatt gas-fired cogeneration facility, which will consist of a 170 megawatt General Electric gas turbine and associated 95 megawatt steam turbine, will supply electricity and up to 350,000 lbs per hour of steam to the Abitibi-Consolidated mill, for use in its newsprint manufacturing process. The high efficiency of the new plant, which will replace Abitibi-Consolidated's steam boilers, will enhance the mill's competitiveness in the market, and help reduce airborne emissions.

More technically, the main components of the Project are as follows. Natural gas is piped to the site for combustion. It is burned in a combustion turbine generator. The combustion turbine generator exhausts its heat into three heat recovery steam generators to produce steam for the steam turbine generator, which produces electricity, and for export of steam to the Abitibi Paper Mill, for paper making. There are two auxiliary boilers as well. The Project will always produce steam for the Abitibi Mill. When it is profitable to do so, it will also produce electricity for sale to the Ontario Power Authority for its resale in the wholesale electrical market, to be sold and distributed through the province-wide transmission and distribution network of Hydro One (the "Grid"). One added feature of the system is a back-pressure steam turbine generator that uses steam returning from the Mill to produce a small amount of electricity (9 megawatts).

3. The system is completely integrated. The contract with the Ontario Power Authority, provides in part as follows:

> The combined cycled equipment and systems ... shall be seamlessly integrated with the auxiliary boiler systems so that each provides back-up to the other for start-up (e.g. pegging steam, gland steam supply, ejectors, etc.) operation and shutdown services.
>
> The auxiliary boilers shall be the main source of steam supply to the Mill. The auxiliary boilers shall produce processed steam to: (i) supplement the HRSG-STG CRHS for Mill steam supply while in Co-gen mode ... and (ii) provide the full Mill steam requirements during periods when the combined-cycle ... [i.e. the electrical generation portion of the Project] is not dispatched and is thus not operating.

The final agreement on the Project was announced on September 24, 2007 and construction commenced shortly after that.

4. The general contractor was V.K. Mason Construction Company ("V.K. Mason"). It entered into a collective agreement with the Lincoln, Welland, Haldimand Building and Construction Trades Council ("the Lincoln Trades Council"). That Council is comprised of the Local Unions of the Building Trades Unions with geographic jurisdiction in the area. It did not include any of the respective employee bargaining agencies to which those Local Unions are affiliated. The collective agreement is not the same as the Provincial Collective Agreement binding on any one of these Local Unions.

5. The parties to this proceeding (after some shuffling and changes of position) are as follows. The Mechanical Contractors Association of Ontario ("MCAO"), the Electrical Trade Bargaining agency of the Electrical Contractors Association of Ontario ("EGBC") and Procon Niagara, a division of 1149855 Ontario Inc. ("Procon") are the applicants. They bring this application as EBAs, or as an affected employer, alleging that the collective agreement between V.K. Mason and the Lincoln Trades Council is a violation of section 162 of the Act, among others. In that assertion, at least with respect to sector, they are joined by the International Brotherhood of Electrical Workers, Construction Council of Ontario ("IBEW"), the Millwrights Regional Council of Ontario ("Millwrights") and the Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the Carpenters"), who take the position that the Project is in the ICI sector. The Lincoln Trades Council, although originally an applicant, took no position and played no role in argument. On the opposite side of the issue are V.K. Mason, the Ontario Provincial Council of the Labourers International Union of North America ("the Labourers") and the Electrical Power Systems Construction Association ("EPSCA"), all of whom take the position that the Project is in the electrical power systems sector.

6. The parties were able to agree on all arguably relevant facts and documents. Hence the matter proceeded essentially by way of argument with reference to documentary evidence that had been filed.

History

7. The argument in this case focused a great deal on what was, or was alleged to be, the historical development of work and bargaining with respect to construction work associated with the production (and to a lesser extent distribution) of electrical power. Some analysis of that history is required at this point.

8. The concept of sector was introduced into the Act in 1971. The history of the concept of sector, and the way in which that concept was adapted and modified over the next thirty years is set out in *The City of Sault Ste Marie* [2002] OLRB Rep. Sept/Oct 870 at paragraphs 20 to 39 in a passage that it too lengthy to repeat here.

9. The issue of sector as it related to the electrical power systems sector did not arise before the Board from 1971 to 2005. The only time it was examined was not by the Board but by Professor S. R. Ellis who was appointed by the Minister of Labour in 1977 as an Industrial Inquiry Commission. That report is examined below, but suffice it to say that there were no changes to the Act arising out of Professor Ellis' report and no issue as to whether a project fell in the electrical power systems sector or another sector was ever considered by the Board or anyone else.

The Ellis Report

10. The Ellis Report was delivered to the Minister of Labour in January 1978. At that time, the Act had been amended to provide, effective May 1, 1978, for province-wide bargaining in the ICI sector. A proposal had been made to the Minister of Labour to combine the ICI and the electrical power systems sectors. The Minister's response was to request Professor Ellis to inquire into the proposal and report on it, which Professor Ellis did.

11. Much has been said and much has been written about the Ellis Report, in my view, rather more than is necessary. Although often referred to as a sort of irrefutable source of fact, it was simply a report to the Minister. It is neither a statute nor a regulation. It is not a decision of the Ontario Labour Relations Board, the body given the statutory task of determining sector.

12. Professor Ellis's ultimate recommendation was that the two sectors ought to remain separate. The Act was not amended. In the course of examining that issue, Professor Ellis, as was appropriate, examined the entire history and structure of bargaining in both sectors. Ultimately, he made a number of recommendations two of which are of significance to the parties in this case. The first was that the ICI sector and the electrical power systems sector not be combined. The second was that the definition of the electrical power systems sector be made more precise. The Legislature did not amend the Act.

13. The admissibility of such reports for the purpose of interpreting legislation is undoubted, but must be put in perspective. In *Sullivan & Driedger on the Construction of Statutes* (4th edition, Butterworths, Toronto: 2002) the authors discussed the use of extrinsic aids such as the Ellis Report at pages 481 to 502. While much of the historical case law would restrict the use of such reports, the authors detail a growing trend to use reports to interpret legislation for the purposes of examining both the "mischief to be cured" and the legislative purpose of statutory enactments that follow on the presentation of a commission or report. The weight to be assigned to that report, of course, is to be determined on a case by case basis. (See also Cote, *The Interpretation of Legislation in Canada* (3rd edition, Carswell, Toronto: 2000) at page 414 to 419.)

14. In an often-cited introductory paragraph, Professor Ellis attempted to be precise about the subject matter of his Report. At page C.1-3 he said:

> 4. The construction industry, or at least those construction industry participants who are most concerned about the issues of interest to this Inquiry, in fact understands the Electrical Power Systems Sector to be primarily an euphemism for Ontario Hydro's capital construction program – both the construction of long distance high voltage transmission lines and transformation stations, and the construction of major power generation projects such as the Pickering Nuclear Power Generating Project and the Bruce Nuclear Power Development Project. But any reasonable interpretation of the words themselves will also encompass the construction of municipal, low voltage, distribution lines and related facilities (not constructed by Ontario Hydro except occasionally under special contract from the municipality) and the construction of privately-owned, generation and transmission facilities. Nevertheless, the labour relations issues which the separate existence of the EPS Sector vis-à-vis the ICI Sector has raised, do not relate to these municipal or private segments of the EPS Sector. Accordingly, I have

> considered these latter segments of the sector only from the point of view of how they might be affected by my recommendations for solving the Ontario Hydro-ICI problem.

This paragraph is, in my view, perfectly straightforward. Professor Ellis makes three points: (i) the construction industry participants most concerned understand that the electrical power systems sector is a euphemism for Ontario Hydro's capital construction projects; (ii) the dictionary definition of the words could include municipal systems and private power generation and transmission systems; (iii) his Report will deal with the reality of the electrical power systems sector, that is, Ontario Hydro, and with what he calls the "other segments" of the sector, only peripherally.

15. Counsel for the Labourers and EPSCA referred to many passages in the Report. Professor Ellis used the phrase "electrical power systems sector" as if it included both private electrical generation and Ontario Hydro. Counsel for the Labourers asserted that the Board in *Barclay Construction Group Inc.* [2008] OLRB Rep. Mar/April 136 ("*Barclay*") had improperly "severed" private power generation from the sector. This is simply a misreading of the Report. Professor Ellis does, in places such as the above paragraph and his conclusions refer to the sector as if it included everything that could fit within a dictionary definition, including private power generation. He refers to private power and municipal systems as segments of the electrical power systems sector.

16. It must be remembered that he was writing a report, not attempting to interpret the Act (as the Board must do). Had he seen that as his task, he might well have gone beyond the simple dictionary definition of the words on the page. Even a casual reading of the Board's decision in the *Heavy Construction Association*, [1973] OLRB Rep. May 245 case would make the reader realize that the task was not as simple as that. More importantly, for most of the Report, he does as he suggests in the introductory paragraph and ignores anything other than Ontario Hydro when he is dealing with the issue of what to do with bargaining in the ICI and electrical power systems sector.

17. The bulk of the Report uses the term "electrical power systems sector" in that sense. For example, at page C.1-10:

> 15. After all is said and done, perhaps the most significant point of distinction is the fact that in the EPS Sector there is only one owner-client, who is single-handedly responsible for a construction program which over the next ten years will be worth in the order of ten billion dollars – a dollar volume that is likely to approximate almost half the dollar volume for the entire ICI Sector during the same period. The ICI Sector is, of course, characterized by a multiplicity of owner-clients.
>
> 16. Furthermore, on most EPS Sector projects, that single owner-client, Ontario Hydro, is also a major contractor – very often the biggest employer of tradesmen on a particular project. In fact, in terms of volume of construction work done with its own forces and the numbers of tradesmen employed year after year, Ontario Hydro is perhaps the most significant single construction contractor in the Province. The ICI Sector has no comparable experience with organizations playing the dual role of owner and contractor.

In his proposals, however, Professor Ellis reverts to treating the sector as if it were defined only by the dictionary definition and distinguishes between the "Hydro part of the electrical power systems sector" and other portions (page C5-5) and indeed, advocated "removing from the sector the construction of privately owned generation transformation and distribution facilities" (page C5-6).

18. His definition of sector in that portion of the Report is no more profound than reading the widest-possible dictionary definition of the words used. He ultimately uses phrases such as "removal from the sector" of private power generators in the course of what is, in fact, a recommendation that the sector be redefined to accord with its reality.

19. Much was made in argument of the fact that the Legislature did not act on that particular recommendation. It is true it did not merge the ICI and electrical power systems sector sectors, nor did it seek to define the electrical power systems sector (or any sector) leaving the task of elaboration to the Board under section 166.

20. The fact that the Legislature did not amend the Act was something that could be seen as acting in accordance with Professor Ellis's recommendation that the two sectors not be combined, although it may have acted for other reasons unknown to us. The failure to act on the other recommendations contained in the rest of the Report is not as likely to be meaningful. There are many other recommendations Professor Ellis made, as well as a more precise definition of the sector that the Legislature similarly ignored. It made no changes requiring coordination between ICI and EPSCA bargaining (referring to bargaining by EPSCA by name, which included only Ontario Hydro and its contractors). It did not redefine the sector. It did not create mandatory bargaining structures with a "public power construction council". It did not require multi-sector bargaining councils. It did not require coordinated expiry dates of collective agreements in the EPS and ICI sectors. It did not put any limitations on the types of collective agreements that could be entered into in the electrical power systems sector. It did not provide for ratification structures for unions involved in bargaining in the electrical power systems sector. It did not adopt his "inter-sector disputes" resolution mechanism, but left the Board to deal with such conflicts as jurisdictional disputes.

21. As noted, courts have begun to look to such commissions and reports with respect to both the purpose of the legislation and its interpretation. As always, the question of weight to be assigned is determined on a case by case basis. It is difficult to assign much weight to the Ellis Report when the issue of the definition of the electrical power systems sector (or any other sector) was not an issue into which he had been asked to inquire. Further, I am unaware of any authority that stands for the proposition that any conclusion should be drawn in circumstances where a legislature does not respond to gratuitously offered advice.

22. The Ellis Report is a useful document, but one whose significance ought not to be overstated. Most of the Report is a discussion of bargaining within an electrical power systems sector that consists only of Ontario Hydro and within the ICI sector. In doing so, it gives a useful description of how bargaining was anticipated to take place in the ICI sector and how it took place in EPSCA negotiations. His comment that the dictionary definition of the words used in the term "electrical power systems sector" could have a wider meaning than that which "everyone in the industry" gave it, is not a finding or a determination of any sort about the extent of the electrical power systems sector. Indeed, the differing uses of the term in different sections of the Report indicate where his, and presumably the Legislature's, real concern was. Finally, I draw no conclusion of any sort from the fact that the Legislature did not further define the electrical power systems sector (or any other sector) any more precisely than it had already done. That is a fact without meaning.

Legislative History

23. Before 1998, electrical power generation was largely in the hands of Ontario Hydro and the distribution of electricity to persons and businesses was a complete monopoly, again in the hands of Ontario Hydro. There was some quantity of electrical power produced by private industry. Counsel for the Labourers asserted that all such privately-produced power was used by the producer for its own use without interacting with the provincial transmission grid. There is no evidence of this one way or the other, but it is fair to say that private power producers produced only a small amount of the power used in the Province. Of course to the extent that they did produce power for their own consumption, they reduced demand on the Grid.

24. In 1998, the Province shifted its policy with respect to electrical power. The precise and lengthy details of the legislative changes are set out in two decisions of the Board in *Independent Electricity Market Operator:* [2008] OLRB Rep Mar/Apr 210 and the more recent decision of November 23 2009, in the same application (Board File No. 3322-03-R) reported at 2009 Can LII 66091 (OnLRB). What follows is a sketch of the relevant highlights of those changes.

25. The Province concluded generally that the production of electrical power should be undertaken by private industry and the role of Ontario Hydro should be reduced in its proportion of the market, but not eliminated. Electrical distribution would remain in the hands of Ontario Hydro, or that portion of it known from that point onwards as Hydro One. The *Electricity Act, 1998*, S.O. 1998, c.15 was passed to amend and replace the existing *Electricity Act*. Ontario Hydro was split into four primary businesses that contained certain parts of the old Ontario Hydro business: Ontario Power Generation Inc. ("OPG") for power generation; Hydro One for the purposes of transmission, the Independent Electricity System Operator ("IESO") to oversee and control the operation of the grid and the Ontario Electricity Financial Corporation to deal with the "stranded debt". (I use the current names for these entities.) The business model, again according to counsel, was that a combination of OPG, Hydro One and the IESO would negotiate agreements with private sector partners to operate (in the case of Bruce Power) or to build electrical generating facilities. This initiative produced only one such project, Brighton Beach Power, of which more is said below.

26. This way of proceeding was found not to be satisfactory. The financial basis of the Brighton Beach Project required a guarantee of revenue stream by the Province and cooperation in the capital outlay. More significantly, the regime produced only one new source of electrical power, albeit a large one.

27. In 2004, the *Electricity Act* was amended again to create a different regime. The Ontario Power Authority ("OPA") was created. Its objects were set out at length in section 25.2(1) of the *Electricity Act*. For our purposes, the significant areas are the forecasting of demand, creating of plans for electrical generation projects, and engaging in activities to support those plans. The OPA was required by section 25.31 to develop a "procurement process" to give effect to these goals. The market was "open" to the extent that there would be no "direction" to produce power, or plans to initiate a project, by OPG, IESO or the Province, nor subsidy of any projects undertaken by private industry. Anyone could prepare a proposal for an electrical generation project (and preferably one using a less polluting fuel source or a renewable energy fuel source). The electricity thus produced would be sold on an open market where prices would fluctuate almost hourly. The OPA would determine how much power was needed and would prioritize the projects submitted to it. Once it had done that, it would enter into contracts with the most desirable proposed ventures that would produce

the amount of electricity that the OPA sought. A contract was required to commence building any project.

28. The "Procurement Process" used by the OPA was first to issue a Request For Proposal for procurement of power. The OPA determined that the Province needed an additional 3000 megawatts of electrical power. In 2006 it issued a Request For Proposal for "1000 megawatts of combined heat and power generation in Ontario" as part of that overall goal of 3000 megawatts. This portion sought proposals for Co-gens. The Thorold Project was one of them.

29. Once a project is approved by the OPA, it must obtain an electricity generating licence from the Ontario Energy Board, as well as authorization, in this case, to build a pipeline to the plant. The electricity must conform to the standards of the Grid, set by the IESO, in accordance with the regulations, rules and licence requirements set by the Ontario Energy Board. Once it has done so, the project has a right under section 26 of the Act to obtain access to the Grid. The electrical power is sold pursuant to the IESO market rules. Counsel for the Labourers asserted that all power must be sold to the OPA for its prevailing price at that time, which price can change by the hour. In *Barclay*, the Board was advised that that power facility (which was not a Co-gen, but an electrical power generator) could, or believed it could, enter into arrangements with single customers for a fixed price and deliver it by the Grid to that customer. Whether or not this is available to a Co-generation project such as the Thorold Project does not matter. Northland Power intends to sell all the power it produces to the wholesale electricity market through the Grid.

History of the issue before the Board

30. Disputes about the boundary between the electrical power systems sector and the ICI sector are relatively recent in origin. There are three decisions the parties referred to: *Ontario Hydro*, [2005] OLRB Rep. May/June 437 (May 6, 2005) ("Ontario Hydro"); *Leo Alarie & Sons Limited*, [2006] OLRB Rep. Sept./Oct. 721 (October 31, 2006) ("*Alarie*") and *Barclay Construction Group Inc.*, [2008] OLRB REP. Mar./Apr. 136 (April 8, 2008) ("*Barclay*"). Many of the parties criticized or attacked either the *Alarie* decision or the *Barclay* decision (and parts of the *Ontario Hydro* decision) for various reasons. The Millwrights and Carpenters argued that *Alarie* was simply wrong and ought to be disregarded. The Labourers argued that *Ontario Hydro* and *Barclay* were in some form of irreconcilable conflict with *Alarie*, which led to "confusion" in the industry.

31. As discussed below, I find all of these arguments to be misconceived. First, while there are differences on some issues of analysis between *Alarie* and *Barclay*, neither in fact contradicts the other. The Labourers argue that they represent simply the two opinions of two different Vice-Chairs. The Labourers are correct in that assertion as far as it goes, but, although there are some differences in analytic approaches, *Alarie* and *Barclay* are not in conflict. Neither contradicts the other, and no confusion should result from any fair reading of the two decisions.

32. The *Ontario Hydro* decision was not a sector dispute at all. It was an application under subsections 1(4) and section 69. The Labourers and Operating Engineers asserted that Ontario Power Generation ("OPG") and Hydro One Inc. ("Hydro One") and various subsidiary corporations were the successors to the old Ontario Hydro. The issue was not really whether or not they were the successors (that much was conceded), but whether the bargaining rights of the Operating Engineers and Labourers to which OPG and Hydro One were the successors, included bargaining rights in the ICI sector. That decision required an examination of the nature of the bargaining rights of those two

unions as they had developed in the electrical power systems sector. It was therefore necessary generally to indicate sectoral boundaries because of the nature of the question before the Board, but nothing more than that.

33. *Alarie* was a sector dispute about wind-powered electrical turbines, sometimes colloquially referred to as a wind farm. *Alarie* did not decide that all electrical power generating projects were in the electrical power systems sector. It decided nothing more than what it had to decide. At paragraph 30 it said:

> We are not dealing with co-generation projects where different considerations may well apply. Nor are we dealing with the construction of large, industrial steam plants where the steam is used to drive electric generators and where the nature of the mechanical, electrical, and structural work associated with those kinds of facilities is analogous to large industrial plants where steam is used in the manufacturing process. A co-generation facility being constructed together with or as part of an industrial installation and a large industrial steam generation plant are, in our view, significantly different from the projects in question before us. The projects before us involve the construction of facilities that are "stand alone" electric generators powered by the wind and transmission lines. (We do not purport to decide in this case whether a privately owned thermal electric generating plant is in the electrical power systems sector. We only note that the construction of that kind of a facility is significantly different from the wind farm projects before the Board in these two cases.) There is no "mixed use" issue before us with these projects.

In *Barclay*, the Board dealt with a sector dispute about a "thermal electric generation plant", specifically a gas-fired, steam-driven electrical generator. While disagreeing with some of the analytic elements of the *Alarie* decision, at no time does it contradict or purport to negate the conclusion in *Alarie*. Specifically, it did not decide that all privately-owned electrical generation facilities in the Province of Ontario were in the ICI sector. It found that the Goreway Project was.

34. Both *Alarie* and *Barclay* took the appropriate analytic framework as that set out in the *City of Sault Ste. Marie*, cited above. However, that decision received little application in *Alarie*, as the particular technology and construction techniques were new to the Province. The Board in *Alarie* concluded that all three characteristics pointed to the electrical power systems sector, including, in the end, bargaining patters (albeit from elsewhere).

35. In *Alarie* he Board was strongly influenced by the following considerations:

(a) this was the first case dealing with the sector into which a privately-owned wind-powered electric power generation project fell;

(b) the Board saw in a Request For Proposal from the Government of Ontario what amounted to the Ontario Government mandating an electrical generating project and regulating it accordingly;

(c) the work history was defined by certain speciality contractors about whom the Board said:

> 27. … The speciality subcontractors that erected the turbines had experience doing this kind of construction work in other jurisdictions and sought agreements with the trades that had the work experience and skills those speciality contractors considered best suited for wind turbine erection work. In effect, those contractors arrived in a jurisdiction where this work was being done for the first time and sought to replicate the collective bargaining patterns they had developed elsewhere. …

The Board concluded in that case at paragraph 33:

> 33. We have found, for reasons expressed earlier, that the electrical power systems sector extends beyond the construction work done for what was at one time Ontario Hydro on property that was at one time the property of Ontario Hydro. We are also of the view that although the work characteristics for some elements of the projects might well be distinctive, there really are not any significant work characteristics associated with construction in the electrical power systems sector, other than government mandating the project where such constitution [sic] takes place as a part of its electric power policy, that are unique to construction in that sector. Bargaining patterns in the segment of the electrical power systems sector to which the EPSCA collective agreement applies are well established. In those areas of that sector falling outside the EPSCA collective agreement, there are not yet long standing bargaining patterns, but, as the employers and trade unions continue working in that part of the electrical power systems sector on new electrical generation and transmission projects, we anticipate, based on the collective bargaining relationships that have been created as a result of these two projects, new bargaining patterns will develop and emerge.

36. In *Barclay*, the Board did indeed take a different view of two matters the Board considered in *Alarie*: the meaning or weight to be accorded the Ellis Report and the regulatory framework surrounding the work. However, these issues were not the deciding factors in either case. The Board concluded that the three factors that constitute the Board's analysis of sector pointed, cumulatively, to the ICI sector. In extremely summary form, *Barclay* concludes:

(a) End Use

> The end use was similar to the electrical power systems sector, but subject to a number of significant qualifications;

(b) Work Characteristics

> The Board concluded that the regulatory regime does not put it uniquely into one sector or the other and that the work characteristics of the bulk of the plant were commonly found in the electrical power systems sector, but also found in the ICI sector. The plant connection

to the Grid facility was typical only of electrical power systems work characteristics;

(c) Bargaining Patterns

The Board concluded at paragraph 83 that:

> The conclusion one draws from this is that when the parties have engaged in the construction facility, not on Ontario Hydro or Ontario Power Generation property that produced electric power, the predominant collective agreement used is the ICI collective agreement or one that is more similar to the ICI collective agreement than it is to an EPSCA collective agreement.

37. The Board considered *Alarie* and stated at paragraphs 84 and 85 that the Board had considered a different pattern of bargaining history relevant to that project, patterns that had developed outside of Ontario and were related closely to the specific technology associated with the building of the wind farms. By way of contrast, there was ample evidence of bargaining patterns already developed within Ontario on which the Board could rely.

38. The Board concluded therefore that the project was in the ICI sector, but expressed no opinion on the "physical connection to the Grid" about which the Board had little evidence.

Task of the Board

39. In different ways, both the Labourers on the one hand and the Millwrights and Carpenters on the other urged the Board to do what it has no business doing. The Millwrights and Carpenters asked me to reject *Alarie* and "return" wind farms to the ICI sector where they "belong". The Labourers on the other hand asked me to reconsider *Barclay* and "restore" the electrical power systems sector to a unity and wholeness they claim was "fractured" by the *Barclay* decision. This is both a misconception of the two decisions referred to above and of the Board's task.

40. The Labourers asserted that the Board in *Barclay* was carving out a portion of the electrical power systems sector. As counsel put it in written submissions:

> "11. In this case the Board has an opportunity to reconsider its findings in *Barclay* which lack rigorous analysis and has the effect of simply carving out a large part of the electrical power systems sector for reasons which are not transparent and are unstated. …
>
> 17. The position of the Labourers is that such a change of direction is appropriate for the Legislature where the norms of democratic change including full discussion of the effects of such a change can be engaged. It is not the job of a single Vice Chair to unilaterally alter the composition and definition of sector. Such action only feeds a concern that important decisions, decisions the Legislature has conspicuously avoided making for decades, are made without consultation and to satisfy a select group of stakeholders in the industry."

Aside from the entirely unwarranted innuendo suggested in the submission, the only basis for the assertion that the electrical power systems sector includes everything connected to electrical generation and distribution is said to be the Ellis Report. Again, the Report was not a piece of legislation, or a declaration or finding with any binding force. It was an opinion, and a well-informed opinion, of one who had been asked by the Minister of Labour to investigate and to report on the extension or application of the province wide bargaining scheme to the electrical power systems sector. Aside from the internally inconsistent use of vocabulary in Professor Ellis' report, which defined the meaning of the electrical power systems sector by reference to a dictionary definition, there is no authority for this assertion.

41. The Legislature had not chosen to define sectors beyond the naming of them in the Act. Indeed the only amendment the Legislature ever made to the Act was to remove the "tunnels" from the definition of sector. It has never defined any sector. Both before and after Professor Ellis' report, the determination of sector in the construction industry was a matter to be decided by the Board under what is now section 164.

42. I need to say nothing more about the two decisions I have discussed above. The Board's role is not to create or legislate the boundaries of sectors of the construction industry. The Act lists them. It is up to the Board, when a question as to sector arises on a particular project, to apply the Act. That involves an application of the Board's expertise and experience to the evidence at hand. In the end, however, the Board makes a decision about what is before it. It does not make legislative decisions.

Analytic Framework

43. The proper analytic framework for determining sector is that set out in the *City of Sault Ste. Marie*:

> 39. In the end, what this means is that there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the "end-use" first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will [be present] and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

44. In this case, the analysis is somewhat complicated by the paucity of previous Board jurisprudence and the sustained and at times bitter attacks on the two decisions of the Board that have dealt with this sector: *Alarie* and *Barclay*. For example, if one accepts the *Barclay* decision, then the production of electricity is an end use which is found in every generation project in the electrical power systems sector, but also on occasion found in industrial projects in the ICI sector. The reverse is not true of *Alarie*, of course, since it found that the two projects it dealt with were in the electrical power systems sector. It did not suggest any universal definition of the boundary of the electrical power systems sector. The same difficulty with relying on *Barclay* arises in dealing with work characteristics. If one accepts that the project is one in the ICI sector then all of the work characteristics found at the Barclay project appear on occasion in the ICI sector.

45. For the purposes of clarity in this decision, in comparing the Thorold Project in terms of end use or work characteristics to other sectors, I shall initially refrain from referring to either case or to the characteristics of steam plants that generate electricity or wind farms or Co-gens. For convenience, I shall refer to those projects that fall indisputably in the electrical power systems or the ICI sectors and shall refer to the former as "OPG projects" and the latter as "non-electrical industries". This is a matter of convenience only and is not intended to imply that *only* OPG projects are in the electrical power systems sector or that there are any "electrical industries" in the ICI sector.

46. As will be seen, this analysis does not point to a definitive answer in either direction. It is therefore necessary to look at bargaining patterns, and specifically bargaining patterns of OPG, electrical generating projects not controlled entirely by OPG, non-utility generators or "NUG's" and Co-Generation projects such as the Thorold Project.

End Use

47. The Thorold Project does two things: it produces steam that is used in paper making and steam that is used to produce electricity. As well, a small portion of the steam produced is used for both processes (in the back pressure steam turbine generator). Those arguing that this Project falls in the electrical power systems sector focus on the electrical generation; those who argue for the ICI sector focus on the steam used by the Abitibi Paper Mill.

48. The production of steam itself is not a distinctive end use. The steam is used in two processes and in any event, is found equally commonly in the electrical power systems and the ICI sectors.

49. Production of steam for industrial use is purely an ICI end use, as the term suggests. Steam may be used for heating purposes in buildings in OPG facilities.

50. The production of electricity is certainly an OPG end use. OPG produces large amounts of electricity by various means. The generation of electricity is not typical of "non-electrical industries".

51. There were many attempts by all counsel to identify one or the other factor as the dominant or primary function. None of these attempts is ultimately convincing.

52. Counsel argued about which purpose was the reason for embarking on the project. The existing steam plant at Abitibi will be demolished and the Co-gen will become the only source of steam for the Abitibi mill. From that, I was asked to deduce that the steam plant was near the end of its life. On the other hand, the continued viability of certain parts of Abitibi Consolidated are fraught with the uncertainties of the paper industry in the twenty-first century; electrical power will always be in demand. In the end, there is no evidence as to which purpose was the initial one (if it ever was only one of them) and is unlikely to be helpful in any event. When Abitibi and Northland Power decided to go ahead with the project, they had both purposes in mind.

53. Counsel for V. K. Mason suggested that the steam for industrial use was secondary because paragraph 3.2.2.9 of the OPA's Request for Proposal required only that the purchase of steam for industrial use be guaranteed only for five years. That of course is only the OPA's Request; it tells

me nothing about the arrangements on this Project. The demolition of the steam plant in the Abitibi mill is more indicative of the relationship between the Project and Abitibi's paper mill.

54. Counsel for the Labourers argued that there is more "power" in the form of electricity than in the form of steam produced. When asked to compare 265 MW to 350,000 lbs of steam per hour, counsel was unable to provide an answer, nor were any of the other counsel. As it happened, the representative from V.K. Mason was an engineer who worked out the formula. (For those who are interested, the steam is equivalent to 9,875 x 350,000 / 34.5 = 100.18 MW of electricity.) It was however clear that this was the first time anyone had made that calculation. There is nothing to suggest that it was material to Abitibi or Northland Power. It also does not address the fact that the steam will run constantly and electricity will be produced only when it is profitable to do so. On the other hand, the steam may not always be at 350,000 lbs of steam per hour, there is no evidence either way. Similarly, it is impossible to predict fluctuations in the electrical power market. That distinction does not provide any assistance in the analysis of sector.

55. The Labourers and EPSCA attempted to draw a distinction between the bargaining patterns between those Co-gen projects that delivered no power to the Grid, a minority of their power to the Grid, and a majority of power to the Grid. In *West York Construction* [1983] OLRB Rep. December 2132 the Board was faced with the task of deciding the sector of a building that was partly used for residential purposes and partly for commercial purposes. The Labourers and EPSCA argue the same should be done in this case using the power production as the defining criteria.

56. There are two difficulties with this approach. One can posit such a distinction; there are examples of all three types of Co-gens. The question is whether the distinction is a meaningful one. First, the measurement of steam and electricity is a valid expression of two kinds of force that is a coherent statement in terms of physics, but appears to have no significance or meaning in the construction of this or other Co-generation projects. Second, the Board in *West York* was faced with the impossibility of dividing up responsibility for work on a single concrete structure, the structural frame of the building, and where the comparison was of identical portions of the same structure. In addition the decision was predicated on an existing local bargaining pattern (something the Board has been loathe to rely on since).

57. As will be seen below when dealing with bargaining patterns, there is, in fact, no discernible pattern of bargaining of collective agreements used in the construction of Co-gens. For those involved in the development and construction of these projects, the percentage of electrical power generated is simply not a factor.

58. Counsel for EPSCA argued that all power produced by the Thorold plant must be sold to the OPA. That is certainly the plan of Northland Power, but as the findings in *Barclay* indicated, that is not always the case. Industries that produce goods for retail markets obviously sell to a wide range of customers, and those that sell to other industries will sell to a more restricted number. Some, notably in the chemical and automotive industries, may have a single customer. The number and identity of potential customers does not demonstrate a sectoral distinction.

59. Because I have excluded consideration of the *Barclay* case, what we have are two end uses, one of which points to the "non-electrical industries" in the ICI sector and one to the OPG projects in the electrical power systems sector. There is nothing that enables me to find that one or the other is predominant. Both are the end uses of this Project.

Work Characteristics

60. Work characteristics is a concept found in the definition of sector in section 126 and is said to be determinative of the sector of the construction industry in which a project is found. In the earliest decision of the Board on sector, *The Heavy Construction Association of Ontario*, [1973] OLRB Rep. May 245, the Board attempted to define what was meant by the term at paragraph 14:

> The work characteristics which distinguish one sector from the other may be shown in terms of the type of problems to be dealt with at the job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as particular characteristics which differ between the various sectors enumerated in the Act.

The Board has not significantly added to this list of examples of characteristics that are relevant to a sector determination, although some of them have been examined in detail in many of the cases. The one common theme among them is that they all relate to issues that arise from the actual work of construction, not from other factors that may apply to any one project. Since the purpose is to define sectors of work in the construction industry, that is hardly surprising.

61. The Board went on in that decision to comment that "work characteristics" was a difficult determination to make in the abstract. For example at paragraph 16 the Board commented that certain characteristics of the heavy engineering sector were also to be found in the construction of a large steel refinery, steel mill, power station or sewage settling pond. Similarly, Professor Ellis said at page C.1-3:

> ... the difficulty is that there are no discernible "work characteristics" capable of determining the scope of the electrical power systems sector in a manner that would reflect the construction industry's actual understanding of the sector.

The Board made the same comment in *Alarie* at paragraph 30, quoted above, although in *Barclay* certain portions of the project were found to have work characteristics associated with the electrical power systems sector.

62. In this case, both EPSCA and the Labourers argued that the Board and more specifically Professor Ellis were wrong and that there was a single distinguishing work characteristic: the presence of electrical generating equipment and the equipment necessary to connect the generator to the Grid. They argued that such equipment is nowhere found in any industrial use (again excluding *Barclay*) and there is no OPG project that does not feature one or the other. Within that restricted universe, that is true. The question is whether that fact is instructive in dealing with the Thorold Project, or indeed any NUG or Co-gen.

63. Various industries are characterized by the machinery and the equipment they utilize to create their product. The Abitibi Mill, to which the Thorold Project supplies steam, produces paper using paper-making machinery that is unique to that industry. Printing presses are found only in the printing industries. Blast furnaces are found in steel and other smelting operations. The question again is whether the product (electricity) and the equipment used to produce it defines the sector.

64. In dealing with any project that deals with the production and distribution of electrical power, the question immediately arises as to whether or not it is part of the electrical power systems sector. That is a sector whose existence is connected to the production and distribution of electricity. However, the sector is not the "electrical power sector". It is the electrical power systems sector. The sector must have something to do with a particular system as well as simply electrical power. Thus, all electrical power systems sector projects will have something to do with electrical power. The question is whether the reverse is true, a question that cannot be answered simply by looking at the name of the sector.

65. In *Ontario Hydro*, a panel of the Board (consisting of myself and both of the Board Members who sat on *Alarie*) said at paragraph 58:

> 58. The Operating Engineers' definition is at variance with the statutory term. The sector is not the electrical power sector; it is the electrical power *systems* sector. Some meaning must be given to the word "systems". The term suggests something more than simply the generation and the transmission of electrical power. To give the word "systems" some meaning, one must put the generation and transmission of electrical power in some sort of integrated context that can be identified as one or more systems. For most of the time from 1952 to the present, that context has been exclusively the work of Ontario Hydro. However, the statute provides no clue as to where the "system" leaves off and any other operation of Ontario Hydro begins. Indeed, it is possible to define it very narrowly or very widely without doing violence to the words in the statute. However one defines the term, one must give some meaning to the word "system" that is different from the phrase "electrical power".

66. EPSCA argued that the electrical power systems sector should be seen as what counsel described as a single system for the production and delivery of electricity. The system, in EPSCA's view, consists of all of the components that are involved in the process from production up to the point where it is delivered to the consumer. That is so, in their view, because electricity is an essential service without which the Province cannot function and hence production and delivery must be seen as a single system.

67. That, of course, is one way of looking at the electrical power systems sector as an essential service, which it clearly is. The question is whether it has any meaning for the purposes of the *Labour Relations Act*. The *Labour Relations Act* does not govern or regulate the production and distribution of electricity in Ontario or of any other essential service. The only issue relevant to the Board with respect to the production and distribution of electrical energy is in the context of a sector dispute. The differentiation of the construction industry into sectors is for the purposes of determining issues related to labour relations. The Board is not responsible, nor does it oversee the supply and delivery of this, or any other, essential service. It does adjudicate labour relations issues that arise in the course of building those things that accomplish that function.

68. Simply because one can conceptualize a system or a network that accomplishes a particular essential service delivery does not result in a conclusion that all of the components of a system or network must fall within one sector. The production and delivery of potable water and the disposal of waste sewage is arguably more basic than the supply of electricity. It certainly precedes it in historical terms. Sewers and watermains are in one sector, water purification and sewage treatment

plants are in the ICI sector (*Matthews Contracting Inc.*, [1993] OLRB Rep. Dec 1332, *City of Sault Ste. Marie*, cited above). Something more than that is necessary to define a sector.

Regulation

69. Both EPSCA and the Labourers point to the detailed regulation of the Project as typical of work in the electrical power systems sector and unusual in other sectors. Some of the regulation is indeed complex. That is to be expected when the electrical portion of the Project connects to the province-wide Grid that can be disrupted dramatically by a significant failure of one generator. There are, it seems to me, three issues addressed by the regulation of this and similar projects. The first is the fact of regulation, second the control of entry of parties into a particular market as suppliers and finally the detail and complexity of the regulation.

Fact of Regulation

70. The fact of regulation does not distinguish this project from others in the construction industry. Certainly there are forms of regulation that are common to all sectors: Building Code, zoning, Occupational Health and Safety compliance, and various engineering codes. However, there are also forms of regulation that are specific to certain types of construction. Pipelines (including the pipeline leading to the Thorold Project) require the approval of the Ontario Energy Board. Water and Sewage treatment plants require specific kinds of regulation on both a municipal and provincial level. Regulation that is specific to certain types of work is a commonplace feature of any sector of the construction industry.

Market Entry

71. The fact that the various boards and authorities that govern the sale of electric power regulate market entry is not a unique feature of these types of projects. The province also controls when, where and whether universities and hospitals will be built or expanded. Nothing can be built without passing successfully through that approval process. Further the process of regulating the construction and operation of hospitals through Local Heath Integration Networks or Universities through various Ministries is not a casual or perfunctory process.

72. The OPA, through its pricing, and the IESO through direct regulation, certainly control entry to the market. Between them, they decide how much power may be sold into the system and what they will pay for it. EPSCA and the Labourers criticized the *Barclay* decision for treating this market regulation, which is extraordinarily complex in terms of electrical power, as the equivalent of an agricultural marketing board. The difference, they say, lies in the detail of the level of regulation of the market that is unique to the production and distribution of electrical power. I do not accept that argument. On a conceptual level, these are all simply markets to which access is controlled by a public body. Conceptually, there is no difference.

73. There is one other area of endeavour that provides a useful illustration of the impact, or rather lack of impact, that a strict control of market entry, combined with a detailed regulation about the operation of a project, has on the determination of the sector of the construction industry in which the project is constructed. The provision of publicly assisted housing is provided primarily by the Province of Ontario through municipal governments that build and operate social housing projects. A small portion of such projects are created, sponsored and operated by private groups (though for philanthropic rather than profit making purposes). The province still funds the housing subsidies and

regulates in extreme detail the operation of the projects. It certainly controls the approval process for any privately built social housing project under the *Social Housing Reform Act, 2000.* The fact that the Province controls the ability to create a project in this "market" (and the detailed level of regulation that is entailed) is not reflected in sectoral divisions. The collective agreement between the Metropolitan Toronto Apartment Builders Association and the Labourers covers both public and private housing as do the various collective agreements covering different phases of low-rise residential construction.

Level of Complexity

74. There is a complex array of regulations and regulatory bodies that govern this Project. I conclude that this level of complexity is neither unique to the electrical power systems sector nor is it relevant to what the Board examines when examining "work characteristics" for the purpose of deciding the question of sector.

75. Some of the approvals necessary are not peculiar to the electrical power systems sector. The approvals needed for the Project from the Ontario Energy Board are not of significance. The application to the Ontario Energy Board was necessary to build the pipeline that supplies gas to the Project. That is true whether the gas is used to produce steam for the paper mill or the electrical generator or both.

76. There are a number of codes that regulate the distribution of power and how that is to be accomplished. Of course, the Thorold Project does not distribute electricity; it produces it for the IESO and Hydro One to distribute through the Grid. Applicable codes in that respect are the *Transmission Code* and perhaps a Local Distribution System Code as well. Those are codes that deal with the Grid operated by Hydro One, and Local Distribution Systems operated by a variety of sources, including Hydro One. The obligation of the Thorold Project is to deliver power in a manner that conforms to the requirements of its customer, the Provincial Grid. Consequently, that is no different from the water purity standards required by a municipality, or the quality control standards of any industry, although the *Transmission Code*, the CHP contract and other regulatory bodies may provide greater detail than many such regulatory regimes.

77. The other area subject to enormous detail is the financial arrangement for the sale of electricity and the calculation of payment owed for it. The many formulae set out in a contract between the OPA and the contracting party on this project (the Board was provided only with the standard form of contract) are initially impenetrable for an outsider in their complexity. It would, of course, be possible for the OPA simply to provide a single rate in exchange for an undertaking to produce as much power as the plant could. That would be absurdly expensive and impossible to control. Certainly, after the experience with Brighton Beach, price guarantees and set rates were not going to be part of any arrangement made by the OPA. The system of calculating payment for the supply of electricity delivered over the course of an hour, the appendices for capacity payments, payments for dispatch orders, contingent support payments, revenue-sharing payments, credit payments, "force majeure" capacity reduction allowances and other such items is staggering in its detail. It also has nothing to do with the construction of the project. It has to do with the market rules for the commercial operation of the project once it is built.

78. The level of complexity of the regulation of the electrical power market, as compared to any other regulated market, is not an assessment I can make on the evidence before me. I have no

comparable evidence about what is required for the approval of a gas pipeline by the Ontario Energy Board, the development of land by various land use and environmental tribunals or the building of a toll highway. I was simply asked to conclude that the lengthy and almost impenetrable documents before me are more complex than anything else. To return to the *Social Housing Reform Act*, that statute also provides a dense layer of regulation about the operation of a social housing project. *The Social Housing Reform Act* itself is a very lengthy and detailed statute and is further elaborated by nine regulations several of which rival in length and complexity (but not higher mathematics) the level of detail filed in this case relating to the Thorold Project. In addition, since the overseers of such projects are municipal rather than provincial, these regulations call for a host of equally detailed municipal policies, codes and requirements. There may be no set of regulations as detailed as those applicable to the Thorold Project, but if not, the regulatory regime applicable to public housing comes a close second. As noted, the greater degree of public regulation does not distinguish public housing from private housing in collective agreements covering the residential sector.

79. The conclusion I draw from this is that the detailed regulation does not provide a demarcation line between sectors in the one other instance where it appears to be as detailed as the regulation surrounding the Thorold project. In this case I see no reason to regard the differences in the level of regulation (about which I have no actual comparative evidence) as a significant distinction between any two sectors and specifically between the electrical power systems sector and ICI sectors.

80. Even assuming that the level and complexity of the regulation is unmatched elsewhere, the regulations and contracts themselves do not impact in any significant way on the construction of the Thorold Project. The *Transmission Code* does not apply to the construction of a power generating plant. To the extent that the *Transmission Code* does determine the nature of the electrical current the Thorold Project seeks to export to the Grid, that simply represents quality control by a customer that is not unique to any sector of the construction (or any other) industry.

81. The provisions of the standard contract dealing with construction are brief in the extreme. They are:

> **2.1 Design and Construction of the Facility**
>
> (a) The Supplier agrees to design and build the Facility using Good Engineering and Operating Practices and meeting all relevant requirements of the IESO Market Rules, Transmission System Code, Distribution System Code, the Connection Agreement, in each case, as applicable, and all other Laws and Regulations. The Supplier shall ensure that the Facility is designed, engineered and constructed to operate in accordance with the requirements of this Agreement.
>
> ...
>
> **2.2. Additional Development and Construction Covenants**
>
> ...
>
> (c) The Supplier agrees to provide, at its expense, all power system components on the Supplier's side of the Connection Point, including all transformation, switching, metering and auxiliary equipment, such

> as synchronizing and protection and control equipment, pursuant to requirements deemed necessary by the IESO, the Transmitter, the LDC (and as specified in the System Impact Assessment, the Customer Impact Assessment and the Connection Impact Assessment, as applicable) and the End-User, as applicable, to protect the safety and security of the IESO-Controlled Grid, the Local Distribution System, each of their customers and the End-User Load, as the case may be. The equipment to be so provided by the Supplier shall include such electrical equipment as the IESO, the Transmitter, the LDC and the End-User, as applicable, deem necessary, from time to time, for the safe and secure operation of the IESO-Controlled Grid, the Local Distribution System and the End-User Load, as required by the IESO Market Rules, the Transmission System Code, the Distribution System Code and the End-User, as applicable.

The obligation to describe the final Project itself is merely that set out in Article 2.1(b):

> (b) The Supplier agrees to provide a single line electrical drawing which identifies the as-built Connection Point(s), clearly showing area transmission and distribution facilities, including the transmission station(s) that is electrically closest to the Facility.

In addition, the Project must provide a brief outline of the major components of the Project as set out in Appendix A to the Contract. Compared to the drawings and specifications that accompany the types of contracts typical in many projects in various sectors, the OPA's standard contract is almost indifferent to construction issues, except at the Connection Point to the Grid. There is, unquestionably, at that point, detailed regulation of the manner of constructing the Connection Point. Most of the contract has nothing to do with construction of the Project at all.

82. Electrical power is now produced by OPG and by private developments for sale to the OPA or some other customer. Before 1998 the vast majority of electrical power was produced, and all of it distributed by Ontario Hydro, and there was no commercial transaction among the various divisions of Ontario Hydro. Presumably Ontario Hydro collected the charges for the supply of electricity from the local distributors (or individual customers in some areas) to whom it sold the power. I do not know what the precise arrangements are now. Presumably OPG is paid by someone other than the direct customers of the electricity. I do not know if that is the OPA or Hydro One or the local distribution networks. Hence, the existence of a commercial basis for the project's relationship to the Grid does not make it a commercial enterprise that inevitably falls outside the electrical power systems sector. It does mean that the financial basis of the project is different for the Thorold Project from what it was for OPG projects before 1998 and perhaps up to the present time.

83. In the end, all that can be said is this. The electricity market is one that is regulated by government, and is regulated more than many and perhaps all other markets. It controls entry to the market for power producers and maintains a monopoly for distribution. There are highly detailed and technical requirements for connecting to the Grid and the nature and characteristics of the power to be supplied. The financial arrangements between the producer and the customer are very complex. However, all of this regulation contains virtually nothing about the construction of a facility such as the Thorold Project, other than a reference to "Good Engineering and Operating Practices". For all its regulation, this particular market has no requirements that dictate or regulate any work characteristic of the construction of the Thorold Project, until it reaches the supplier side of the Connection Point.

84. At the Connection Point, the regulation of the supply of electricity does impact on the methods of construction and the work characteristics associated with it. In *Barclay*, I found that these characteristics were most closely associated with the electrical power systems sector or, in the context of this decision, the OPG projects, and only one set of standards used in the rest of the plant were characteristic of electrical power systems sector work. As a result I expressed no opinion as to the work dealing with the "connection to the grid". In part, that decision was based on the fact that this was a portion of the project that required the active participation of Hydro One. I am unable to discern whether Hydro One would be involved in the construction of the Connection Point, although it would clearly be concerned about its fitness for connection. The parties did not focus on that part of the project as a separate item. In the context of the entire Project, it is a small portion of the work.

85. I conclude therefore that there are no work characteristics which distinguish this Project overall from those in the ICI sector or the electrical power systems sector, unless one concludes that any project involved in the production of electrical power is *per se* an electrical power systems sector project, a contention which is not borne out by any analysis.

Bargaining Patterns

86. The relevant bargaining patterns analysis must focus on projects which in whole or in part produce electrical energy. Within that sphere, there are potentially three relevant types of collective agreements:

(1) The provincial collective agreement of each trade, which is the only collective agreement that the trade may lawfully conclude in the ICI sector;

(2) The EPSCA collective agreements, which have been applied to all construction work on OPG projects and its successor Bruce Power;

(3) Any other collective agreement that may be created for use on this type of project.

87. Before the argument commenced, the parties had agreed on a unified list of previous projects that involved the generation of electric power, and the collective agreements used by all trades on that project. The collective agreements were classified as "EPSCA", "Provincial Agreement/ICI" and "Provincial Agreement/Sector Undetermined". Only the Labourers objected to the accuracy of the summary, and those issues of accuracy were clarified by the time argument commenced. The Labourers also complained generally of the "misleading" nature of the third category. Their objection is this. The Labourers argue that the use of a provincial collective agreement does not indicate an acceptance by the parties of the sector in which the Project fell, but rather an agreement simply to use that collective agreement to govern terms and conditions of employment on the Project. In many cases, I am sure this is true; probably that is the reason for distinguishing between the second two categories, "Provincial Agreement/ICI sector" and "Provincial Agreement/Sector Undetermined". Indeed, many of the provincial collective agreements state on their face that they cover more than the ICI sector, which is effective if an individual employer has given the employer bargaining agency or a component of it the authority to bargain for it in those sectors. For those trade unions whose Provincial Collective Agreement is limited to the ICI sector, of course, it was an explicit choice of an ICI collective agreement.

88. I am unclear from argument whether the Labourers dispute the characterization of some projects as "Provincial Agreement/ICI Sector" on that same basis. Certainly no other party did. In the end I conclude it makes no difference whether this category is what it says, that is the use of the Provincial Collective Agreement by all trades explicitly recognizing it as an ICI project, or whether it represents the use of the Provincial Collective Agreement by all trades on the site, and that all of them except the Labourers believed it was used because the work was in the ICI sector of the construction industry.

89. In the end, what parties' believed at the time about which sector they were working in is all rather beside the point. An examination of bargaining patterns is not an examination of what sector the participants thought they were working in (if they thought about it at all), but which collective agreements, for whatever reason, they did use. The "pattern" is one of activity, rather than of thought or belief. The question is whether the bargaining for collective agreements covering employees performing this type of construction work are EPSCA collective agreements, Provincial Collective Agreements or some new and different type of collective agreement.

90. I further reject the assertion of EPSCA and the Labourers that a provincial collective agreement as modified by an agreement on a particular job, or under the formal mechanism of the Project Agreement provisions of section 163.1, ceases to be a provincial collective agreement. Provided that a variance of a Provincial Collective Agreement is made available to all bidders and participants on a project, and is approved by the employer and employee bargaining agencies, any variation is a valid amendment to the Provincial Collective Agreement. All the industry participants are familiar with jobs that have been subsidized through "stabilization funds" or "enabled" in some fashion, generally by the variation of wage rates or mobility provisions or some other provision of the collective agreement. This happens particularly in difficult economic times and is a common feature of provincial bargaining. With respect to the Project Agreement, that is simply a statutory process whereby a provincial collective agreement can be modified for the purposes of concluding a particular project. I note once again the employee bargaining agencies must be given notice. Such projects are often, but not necessarily, in the ICI sector. The Project agreement modifications do not make the Provincial Collective Agreement any the less lawful, or any the less a modified Provincial Collective Agreement. In any event, there are few projects (and none of them Co-gens) where the parties' agreement indicated that the Provincial Collective Agreement was used where sector was undecided or where the sector was explicitly agreed to be non-ICI.

91. Although it was not stated explicitly, the "EPSCA" category includes, I assume, both collective agreements to which EPSCA is a party, and any other agreement that does not include EPSCA, but which is different either from the EPSCA Agreement or the Provincial Collective Agreement (e.g. the Brighton Beach project).

92. For the purposes of analyzing the material, I shall refer to the privately-owned and operated electrical generating projects which are powered by steam or by wind as non-utility generators or "NUG's". The facilities that produce both steam for industrial uses and for the generation of electricity (regardless of whether that electricity goes to the industrial sponsor of the project or to the Grid) are Co-generation projects or "Co-gens".

93. Counsel for the Labourers objected to the term "Co-gen", which he argued was an imprecise term capable of more than one meaning. In support of that argument, he pointed to the definition of a "By-Product Fuel-Fired Industrial Co-generation Facility" contained in the glossary of

terms in Appendix "B" to the request for proposal issued by the OPA. I find nothing difficult about the definition given in that Appendix, and indeed it simply contrasts with the "Natural Gas-Fired Industrial Co-generation Facility" found a few pages on. In other words, the glossary distinguishes between two types of Co-generation facilities. The term "Co-generation facility" is a term that is so commonly known it does not require further definition in this definition-laden glossary. No other party to the hearing had any trouble with the meaning of the term, and indeed even the Labourers did not suggest that any of the projects on the list classified as "Co-gens" ought to be treated in some different fashion from the others. The term is a common one in the industry referring to projects which produce both steam for industrial use and for the generation of electricity or to use the words of the Request For Proposal itself, a "combined heat and power facility".

94. The parties' chart identifies 56 Co-gen projects. They were all built using the Provincial Collective Agreements. They are all classified in the chart as "Provincial Collective/ICI Sector". There are no exceptions. It applies where most of the steam is used for an industrial use and to projects where the majority of the steam is used for electrical production. It applies when the electrical portion is used exclusively by the industrial process (only 6 of them), primarily by the industrial process, and where a majority of the electrical power is delivered to the Grid. Some projects produce only a small amount of electricity, some produce a large amount of electricity (e.g. No. 2 Algoma, 70 MW, No. 24 Iroquois Falls, 120 MW, No. 41 Kirkland Lake, 102 MW, No. 64 St. Catherine's General Hospital, 250 MW, and No. 74 Trans Alta, 565 MW). There is simply no variation in the bargaining pattern at all. All Co-gens built before the Thorold Project were built under a provincial collective agreement defined by all or almost all involved as an ICI agreement.

95. I note as well that there was no distinction between the main portions of the projects listed and any work that was done at the point where the connection was made to the grid. On the other hand, the summaries did not really contemplate such a detail, if it did make a difference. All projects were treated as a single unit.

96. This pattern is reinforced when looking at NUG's. All of the NUG's produce more electrical power than most of the Co-generation facilities. There are 12 projects (13 if one includes Bruce Power) that produce electricity from heat and steam energy. Of the 13 projects listed, the agreements applied are as follows: Bruce Power is bound to the EPSCA Agreement as a successor to Ontario Hydro. Of the remaining 12, 8 were built using provincial collective agreements, 6 of them as "Provincial Agreement/ICI Sector". This includes the Goreway Project, which was the subject of the *Barclay* decision, and Halton Hills, where one trade union considered bringing a sector challenge and then abandoned that thought. Two others are classified as "Provincial Agreements/Sector Undetermined".

97. That leaves 4 projects built under an EPSCA agreement or, at least, an agreement that does not resemble the provincial agreement. One of these was the Brighton Beach project, about which the Board said at paragraph 5 of its decision, that some trades negotiated collective agreements similar to ICI province-wide agreements and some were more similar to EPSCA collective agreements. However, it appeared that Brighton Beach and the various local unions at least tacitly agreed that this project did not fall within the ICI sector. Although the Portlands Project was described as "Provincial Agreement/Sector Undetermined", counsel agreed that this was built under a modified EPSCA style agreement. The other two are the Five Nations Project and the Mississauga Energy Projects, about which the parties provided me no information. The only distinguishing

feature between Brighton Beach and Portlands and the 8 other NUG's built under a Provincial Collective Agreement is that OPG was involved as a participant in Brighton Beach and Portlands.

98. The *Alarie* decision dealt with two projects (Lake Erie Shores and Prince Township) that were wind farms that generated electrical power to supply the Grid. The Board found they were in the electrical power systems sector. The parties identified 13 other wind farm projects built after the wind farms discussed in *Alarie*. Ten were classified as "Provincial Collective Agreement/Sector Undetermined", two were identified as "Provincial Agreement (Non-ICI), and one was identified as "Project Agreement/ICI Sector". Whatever conclusions one might wish to draw about the sector of such projects, the prediction of the Labourers that new bargaining patterns were likely to develop and emerge in the area of wind farms has not in fact, been realized.

99. The other source to look for bargaining patterns in formal and legal terms is the recent accreditation applications filed with respect to the electrical power systems sector. EPSCA has applied for and been accredited in four applications in respect of employers for whom bargaining rights were held by the Labourers (Board File 0516-07-R), Boilermakers (Board File 1284-09-R), Ironworkers (Board File 1285-09-R) and the United Association (Board File 0515-07-R) in the electrical power systems sector. In each case, the collective agreement to which the majority of employers was said to be bound is the EPSCA Agreement and the bargaining unit of employers defined in each accreditation reflected the scope provisions of that agreement, namely:

> All employers employing ... [trade name] engaged in all construction work [as defined] in the electrical power systems sector performed on Ontario Power Generation, Bruce Power, and Hydro One property.

100. The Mechanical Contractors Association of Ontario, one of the applicants here, was accredited to represent a bargaining unit of employers for whose employees the UA had bargaining rights in the electrical power systems sector (Board File 3744-08-R) described as follows:

> All employers of [plumbers, etc.] in the electrical power systems sector in the Province of Ontario, save and except employers that are named in the accreditation certificate dated November 13, 2007 (Board File 0515-07-R). [i.e. the EPSCA accreditation]

101. The collective agreement to which the MCAO stated the employers identified in Schedule "E" to that application were bound is the Provincial Collective Agreement with the UA. On its face, it covers the electrical power systems sector, as well as the ICI sector. As the panel hearing that application, I had some concerns about it. The projects identified as being the projects on which employees and employers worked during the relevant time for the accreditation order included Goreway, which had already been found to be in the ICI sector, and Halton Hills, about which there might have been a dispute brewing, although in the end no party challenged the sector in which the project was built. All of the projects identified appeared to be NUG's. Once the employees employed on Goreway and Halton Hills were removed, there were, in fact, very few employees to count in that application. The other projects identified were listed by the parties, but no information was supplied to the Board about what those projects were. The Board does not conduct an inquisitorial process. In the face of an agreement of the parties when there is no evidence to the contrary, the Board accepts those facts. In this case, there was no reason not to grant the accreditation order, and it was granted.

102. Counsel for the Labourers described this process as the MCAO "doing it right". Given the number of employees identified for the purposes of the "double majority test" in that application who were working at Goreway or Halton Hills, it strikes me as more of a "just in case" sort of application.

103. In any event, those applications seem to reflect the same pattern as the non-utility generators examined in this application. When OPG, Bruce Power or Hydro One are involved, the EPSCA Collective Agreement is applied. When none of them is involved, the Provincial Collective Agreement is used, whether or not there is agreement on the sector of the project. In any event, with respect to Co-generation projects like the Thorold Project, the pattern of using exclusively ICI sector provincial collective agreements is undisturbed.

104. In summary then, bargaining patterns point decisively to the use of the Provincial Collective Agreement, and explicitly to the ICI sector, with respect to Co-generation facilities and largely to the use of provincial collective agreements (even when sector is not defined) in the steam and wind-driven generating facilities.

105. What is significant is not what parties thought of what they were doing, assuming they turned their mind to the question of sector at all. What is significant is that for these types of projects, there was no new or different bargaining structure created. It was not necessary to respond to "new" or "special" labour relations issues when performing this work. There were no new employer associations created to address bargaining specifically with respect to this kind of work. The Provincial Collective Agreement structure was quite sufficient to handle the bargaining. Those facts lead one to conclude that there were no "work characteristics" that required a different bargaining or collective agreement approach to the performance of work on these projects.

106. The significance of bargaining patterns is described in *West York Construction*, cited above, at paragraphs 3 and 25:

> 3. The idea that the construction industry is divided into different divisions or sectors originally developed independently of any provisions in the *Labour Relations Act*. Instead, the different sectors evolved as a result of employer associations and trade unions entering into separate collective agreements covering particular types of construction work. The lines separating the different types of work or sectors evolved primarily on the basis of common understandings, and to the extent they were written down, it tended to be only in collective agreements negotiated between the various unions and employer associations. In 1971 the Act was amended to reinforce the bargaining position of employer associations by permitting the Board to "accredit" them as the statutory bargaining agent for employers, whether members of the employer association or not. In that many employer associations tended to be active only in a particular geographic area, and in one or, at most, a relatively small number of sectors, the accreditation provisions of the Act specified that the Board could accredit an employers' association by reference to a geographic area and by reference to one or more sectors. (The current provision in this regard is set out in section 126 of the Act). So as to explain what it meant by the term sector, coincidental with the enactment of the accreditation provisions in the Act, the Legislature enacted what is now section 117(e). In setting out the various sectors, the legislation referred to the residential and ICI sectors as being separate sectors, a move which recognized, and likely hastened, an already existing

> trend towards treating "building construction" differently on the basis of whether it is residential or ICI. In 1978 the Legislature amended the Act so as to consolidate bargaining structures in the ICI sector on a province-wide basis, and to stipulate that, with certain exceptions, the only agreements which could apply to ICI work were the provincial agreements referred to in section 136(1)(e). This amendment gave increased importance to the concept of sectors, and to the issue of determining exactly what work came within the ICI sector. *We do not believe, however, that by giving statutory recognition to the concept of different sectors and by enacting special provisions with respect to the ICI sector, the Legislature thereby intended to change the existing understandings between trade unions and employers concerning the scope of the different sectors.*
>
> 25. Lacking a definition of either the residential or the ICI sector in the Act, the Board is required to determine the dividing line between them with limited statutory guidance. In determining the matter, we incline to the view that as far as reasonably possible our conclusion should be one which takes into account existing industrial relations realities. We would refer in this regard to our earlier expressed view that by incorporating the notion of sectors into the Act, the Legislature did not thereby intend to change the existing understandings between trade unions and employers as to the scope of the different sectors. ...

In this case, the existing understandings between trade unions and employers are crystal clear when looking at Co-gens and reasonably clear with respect to NUG's.

Conclusion

107. Although bargaining patterns relate to the statutory purpose of defining sectors of the construction industry, they do not determine the outcome of any sector dispute. The *West York* decision itself referred to local bargaining patterns which has not been part of the Board's analysis since that decision. Indeed, the statutory definition requires the Board to look at work characteristics and, implicitly, end use. Sometimes these will be decisive. More often, as the Board stated in *The City of Sault Ste Marie* decision, cited above, it will be a matter of considering all of the factors and arriving at a result based on the weighing of all three of them.

108. In this case, neither the end use nor the work characteristics provide a clear indication of sector. However, the pattern of bargaining and use of the provincial collective agreement is very clear. It is certainly confirmatory of *Barclay*. Accepting then that *Barclay* was correctly decided, that would indicate that both the end use of electricity production and the work characteristics associated with electrical equipment and machinery, and the regulation of the sale of electrical power, are found occasionally in the ICI sector, as well as invariably in the electrical power systems sector. With respect to Co-gens, the pattern speaks loudly and clearly.

109. I conclude then that the end use and work characteristic issues point almost as strongly to the ICI sector as they do to the electrical power systems sector, and the bargaining patterns point strongly to the ICI sector. Accordingly, I declare that the Thorold Project is work falling within the industrial, commercial and institutional sector of the construction industry.

0962-09-G Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Wasaga Trim Supply (2006) Inc.**, Responding Party v. The Trim Association of Ontario, Intervenor

Construction Industry Grievance – Settlement – The employer sought a declaration that it was not required to apply the terms and conditions of the collective agreement between the applicant and the contractors association to which the employer belonged (the "High Rise Agreement") – The Board found that through a series of earlier applications, including an accreditation and minutes of settlement in a related employer file, the employer became bound to the "Low Rise Agreement" – One of the provisions of the latter agreement required the employer to apply the terms of the High Rise Agreement if its employees performed work on a building captured by that agreement (the "cross-over" clause) – Finding the accreditation irrelevant to the issue before it, the Board held that the employer's signing of the Low Rise Agreement bound the employer to all of its provisions, and one of those provisions required that the employer apply the terms and conditions of the High Rise Agreement in appropriate circumstances – Motion dismissed; matter referred to Manager of Field Services

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Mike McCreary* and *Frank Munno* for the applicant; *Bill Anderson* and *Jose Lopes* for the responding party; *Joseph Liberman, Mike MacLellan* and *Carlo D'Ambrosio* for the intervenor.

DECISION OF THE BOARD; November 6, 2009

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as am., (the "Act") in which the responding party, Wasaga Trim Supply (2006) Inc., moves by way of a preliminary motion for a declaration that it is not required to apply the terms and conditions of the collective agreement between the applicant and The Toronto and District Carpentry Contractors Association (the "High Rise Agreement") to the work it performed on a high rise residential project in Toronto.

2. The facts relevant to this preliminary, but seminal issue are not in dispute. The Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America ("CORC") was certified in respect of Wasaga Trim Supply Inc. ("Wasaga Trim") in November 2006 in respect of the industrial, commercial and institutional sector of the construction industry in the province of Ontario and in respect of all other sectors in Board Area 28 (the County of Grey). At the time the certification application was made, both the responding party and Wasaga Trim were in existence, but CORC had named only Wasaga Trim in its application.

3. In June 2007 CORC filed an application under section 1(4) of the Act and referred grievances to the Board for determination under section 133 of the Act in which it sought, among other things, a single employer declaration in respect of both the responding party and Wasaga Trim. CORC had earlier filed an unfair labour practice complaint under section 96 of the Act against Wasaga Trim. The parties to those three proceedings entered into Minutes of Settlement in May, 2008 in which they agreed to the Board making a number of declarations and orders. Both the responding party and Wasaga Trim were parties to and signed the Minutes of Settlement. The Board

incorporated the parties' Minutes of Settlement in a decision dated May 13, 2008 in which it stated it was making "the declarations and orders set out in the Minutes of Settlement".

4. The applicant is one of the constituent local unions of CORC.

5. The relevant portions of the Minutes of Settlement provide:

> 1. A Declaration that Wasaga Trim Supply Inc. is bound to the Carpenters' Provincial Collective Agreement.
>
> 2. A Declaration that Wasaga Trim Supply (2006) Inc. is bound to the Carpenters' Provincial Collective Agreement.
>
> 3. A Declaration that Wasaga Trim Supply Inc. is bound to the Residential Low-Rise Trim Carpentry Collective Agreement between the Wood Mill & Trim Association of Ontario (c.o.b. Trim Association of Ontario) and the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America effective May 1, 2007 to April 30, 2010 (the "Residential Low-Rise Trim Carpentry Collective Agreement")
>
> 4. A Declaration that Wasaga Trim Supply (2006) Inc. is bound to the Residential Low-Rise Trim Carpentry Collective Agreement.
>
> 5. A Declaration that the terms of the Residential Low-Rise Trim Carpentry Collective Agreement apply to the Parties in Board Area 28.

6. Prior to CORC, Wasaga Trim and the responding party entering into those Minutes of Settlement, the Board issued a certificate of accreditation to the intervenor by decision dated January 16, 2008. The bargaining unit of employers for which the intervenor was granted bargaining rights was described as all employers of carpenters and carpenters' apprentices for whom the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America holds bargaining rights, in the low-rise part of the residential sector of the construction industry in Board Areas 8, 9, 18 and 26. The Board added the following clarity note to the bargaining unit description describing the work encompassed by the accreditation order :

> The work covered by this accreditation certificate consists of work performed by all carpenters and carpenters' apprentices while performing trim carpentry in new subdivision work (7 or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basements).

7. The scope of the bargaining unit described in the Residential Low Rise Trim Carpentry Collective Agreement (the "Low Rise Agreement") mirrors the bargaining unit description (including the clarity note) set out in the Board's accreditation order.

8. The responding party was engaged in carpentry work on a high rise project in Toronto in June, 2009. The applicant claims that the responding party is required, by virtue of section 1.04 of the Low Rise Agreement, to apply the terms and conditions of the High Rise Agreement when it does work coming within the scope of the High Rise Agreement. A failure or refusal to apply the terms and conditions of the High Rise Agreement to such work is, according to the applicant and intervenor,

a violation of section 1.04 of the Low Rise Agreement. Section 1.04 of the Low Rise Agreement provides:

> If the contractor performs work in the High Rise Residential Sector of the construction industry, such work shall be performed in accordance with the terms and conditions of the High Rise Trim Collective Agreement between the Carpenters and Allied Workers Local 27 and the Toronto and District Carpentry Contractors' Association, which is incorporated by reference herein and the contractor shall forthwith sign and become bound to said collective agreement.
>
> It is agreed and understood that that, in addition to signing the High Rise Trim Collective Agreement the Contractor shall ensure that they abide by all the terms and conditions of said collective agreement, monetary and otherwise, as stipulated in said collective agreement.

9. There is no doubt the bargaining rights held by the applicant in respect of the responding party by virtue of the Low Rise Agreement and the declarations made by the Board in its May 2008 decision do not extend to the responding party's employees when they are engaged in work outside the scope of bargaining unit set out in the Low Rise Agreement.

10. The issue before me is whether section 1.04 of the Low Rise Agreement is applicable to the responding party and requires the responding party to apply the terms and conditions of the High Rise agreement when it is doing high rise residential work.

11. Section 1.04 of the Low Rise Agreement is what is commonly referred to as a "cross-over clause". The responding party accepts it is bound by the Low Rise Agreement by reason of the Board declaration to which it agreed and the certificate of accreditation issued to the intervenor in January, 2008. It contends however, to the extent the Low Rise Agreement purports to apply to work that is outside the scope of the bargaining unit in the Low Rise Agreement and beyond the scope of the bargaining unit of employers described in the certificate of accreditation, the Low Rise Agreement cannot apply to the responding party because there is neither a statutory basis nor an agreement obliging the responding party to carry out its high rise residential work in accordance with either the Low Rise Agreement or the High Rise Agreement.

12. The applicant and intervenor submit the responding party, when it agreed to the Board issuing the declaration it was bound to the Low Rise Agreement, was agreeing to be bound by that collective agreement in the same way it would be bound if it had actually signed that collective agreement. They submit the responding party did not qualify or limit in any way its agreement to be bound by the Low Rise Agreement. One of the terms contained in that collective agreement is the cross-over clause in section 1.04.

13. The applicant also argues the Board should not even entertain the responding party's motion since it is, in effect, seeking to resile from the settlement agreement it had entered into resolving a number of contested Board proceedings. The applicant submits it does not lie in the mouth of the responding party, after having agreed to a settlement that expressly requested the Board issue a declaration that it is bound, without any qualification, to the Low Rise Agreement to argue that one provision in that agreement is not binding on it.

14. The applicant also contends the Board issued a declaration based on the parties' Minutes of Settlement and that it is simply too late for the responding party to, in effect, seek to have this panel of the Board reconsider the Board's decision declaring the responding party bound to the Low Rise Agreement.

15. The applicant points out the responding party accepts it holds bargaining rights for the employees of the responding party in the low rise segment of the residential sector of the construction industry in Board Areas, 8, 9, 18 and 26 by reason of the declaration and is, therefore, by virtue of both the accreditation order and its consent to the declaration issued by the Board that it was bound by the Low Rise Agreement, required to abide by all the terms of the Low Rise Agreement, including the cross-over provision in section 1.04 when performing work in that segment of the residential sector in those Board Areas. The applicant submits the cross-over clause in section 1.04 of the Low Rise Agreement is a proper and enforceable provision of that agreement so that even if the Board were to entertain the responding party's argument, the responding party remains subject to all the terms and conditions of the Low Rise Agreement, including section 1.04.

16. The responding party submits its consent to the declaration on which the applicant and intervenor rely to argue that it must apply the terms and conditions of the High Rise Agreement was merely its recognition of being bound by the Low Rise Agreement by virtue of the intervenor's certificate of accreditation. It submits it did not have the intention of expanding the scope of the collective agreement by which it was bound as a matter of law. It claims it was not agreeing to be subject to the cross-over clause which, it contends, is beyond the scope of authority of the accredited bargaining agent to negotiate and enter into on behalf of the employers the intervenor represents.

17. I do not accept the underlying premise of the responding party's submission. Its consent to the declaration was, in my view, much more than recognizing that, as a matter of law, it was bound by the Low Rise Agreement by reason of the certificate of accreditation. Because the applicant did not hold bargaining rights in respect of the responding party in the Board Areas and sector the accreditation certificate encompassed (Board Areas 8, 9, 18, and 26) the Low Rise Agreement could not bind the responding party when it worked in the residential sector in those Board Areas prior to the Board making the declaration in May 2008. See *Platinum Drywall Inc.*, [2002] OLRB Rep. Nov./Dec. 1149 (December 5, 2002). That changed and the responding party was required to abide by the Low Rise Agreement when it consented to the declaration that it was bound to the Low Rise Agreement.

18. The fact there is an accreditation certificate that binds the responding party to the Low Rise Agreement is, in my view, irrelevant to the issue before me. Prior to the responding party agreeing to have the Board issue the declaration on May 13, 2008, the applicant did not hold bargaining rights for employees of the responding party in the low rise segment of the residential sector in Board Areas 8, 9, 18 and 26. The accreditation of the intervenor in January 2008 did not affect the responding party. The responding party was not bound by the Low Rise Agreement until the Board issued the declaration based on the responding party's consent. Therefore, I need not determine in this case whether an employer that becomes bound by the Low Rise Agreement only by virtue of the accreditation of the intervenor is required to apply the terms and conditions of the High Rise Agreement when doing work within the scope of the High Rise Agreement by reason of the cross-over clause in section 1.04.

19. I am satisfied the responding party was bound by the Low Rise Agreement at the time the event giving rise to the grievance occurred by virtue of its consent to the declaration issued by the Board. The fact the certificate of accreditation also binds the responding party to the Low Rise Agreement does not diminish the consequence of it having consented to the declaration it was bound by the Low Rise Agreement.

20. The responding party's intention in consenting to the declaration must, in my view, be gleaned, not from what it says now was its intention at the time, but rather by the language used when the declaration was issued and by the extant circumstances at the time it entered into the settlement and consented to the declaration. There was no limitation or qualification to its consent to the Board issuing the declaration it was bound by the Low Rise Agreement and, perhaps more importantly, it did not become bound by that collective agreement until the Board had issued that declaration.

21. The cross-over clause in the Low Rise Agreement does not extend the scope of the bargaining unit in the Low Rise Agreement nor does it result in the responding party being bound by the High Rise Agreement. Rather, it requires the responding party, when its bargaining unit employees are doing work covered by the High Rise Agreement, to apply the terms and conditions of that collective agreement by reason of section 1.04 of the Low Rise Agreement. In other words, section 1.04 of the Low Rise Agreement incorporates by reference the terms and conditions of the High Rise Agreement that apply when the employees in the bargaining unit described in the Low Rise Agreement perform work to which the High Rise Agreement applies. See for example *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720. The Board in *Triumph Trim Ltd.*, decision dated August 3, 2004, unreported, Board File No. 0439-04-R, Q.L. cite [2004] OLRD No. 1836 succinctly set out the effect of a cross-over clause at paragraph 2:

> A "cross-over" clause of the sort in this collective agreement does not create bargaining rights, it simply applies the terms and conditions of certain other collective agreements if the employer assigns employees in the bargaining unit to perform work covered by those other collective agreements.

22. The Board in *Lafarge Canada Inc.*, decision dated May 27, 1999, unreported, Board File No. 4003-98-G, Q.L. cite [1999] OLRD No. 1793 dealt with a situation in which an employer consented to be bound by certain agreements applicable to all sectors other than the industrial, commercial and institutional sector of the construction industry. The agreements to which it agreed to be bound contained a cross-over clause requiring the employer to apply the terms and conditions of the ICI provincial agreement when it did work within that sector of the construction industry. The Board wrote at paragraphs 23 and 24:

> 23. … Or are we to take the words of paragraph 10 at their face value, *viz.* the company agreed to be bound by all of the non-ICI collective agreements (including, by implication, their cross-over clauses)?
>
> 24. The cross-over clauses of the collective agreements do not confer bargaining rights upon the union. They prescribe terms and conditions of employment, but not bargaining rights. The absence of bargaining rights in the ICI sector can co-exist with an undertaking by the company to abide by the terms of the ICI agreements referred to in Articles 3.07 and 11 of the collective agreements. Hence, in our view, there is no operating inconsistency between the provisions of the collective agreements and the Settlement Agreement; there is therefore no conflict between the collective

> agreements and the Settlement Agreement. Had there been express exclusionary language which rendered Articles 3.07 and 11 of the collective agreements ineffective, then that intention would be clear. But there is no such language. On the contrary, the express language of paragraph 10 of the Settlement Agreement is that the company agreed to be bound by "all" of the union's applicable collective agreements in the non-ICI sectors. No limitation is placed upon the full applicability of those agreements.

In my view, the Board's analysis in *Lafarge Canada Inc.* is compelling. Just as the employer in *Lafarge Canada Inc.* agreed to be bound by collective agreements containing a cross-over clause requiring it to apply the terms and conditions of other collective agreements, the responding party in this case consented to a declaration it was bound by a collective agreement containing a similar provision.

23. The responding party relied on the Board's decision in *Elirpa Construction & Materials Ltd.*, [1994] OLRB Rep. July 838 to argue that the cross-over clause cannot apply to the responding party when it does work beyond the scope of the certificate of accreditation. The Board in *Elirpa Construction & Materials Ltd.* determined an employer that had become bound by the sewer and watermain collective agreement only by virtue of accreditation applicable to the sewer and watermain sector was not required to apply the terms and conditions of the collective agreement applicable to the roads sector when doing work covered by the road sector collective agreement. The sewer and watermain collective agreement contained a cross-over clause requiring employers bound by the sewer and watermain collective agreement to apply the terms and conditions of the road agreement when doing work in the roads sector. The Board at page 843 wrote:

> 21. It is clear that the legislature intended accreditation orders to be attached to a sector and geographical area, in the interest of more orderly collective bargaining where statutory conditions are met. It is analogous, but not identical, to the scheme in the ICI sector which forms the basis for provincial bargaining in that sector. In considering that scheme, the Board has consistently held that the sectoral lines drawn in the statute govern, unless bargaining rights outside those sectoral lines have been assigned or given by some other means. The Board has made this point in a number of fact situations. See *Beckett Elevator*, [1982] OLRB Rep. Sept. 1244, where the Board found the bargaining rights which flow from the statute did not bring with them, to non-members, the consensual internal grievance process of members. In *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322, where the Board found that an employer *was* a member of an organization bargaining consensually beyond the statute's sectoral designation, it was bound. Where an employer had not become a member or otherwise assigned its bargaining rights to an association, as in *Fred Jantz Masonry Construction Limited*, [1981] OLRB Rep. Sept. 1229, it was only bound to the extent of the statute's compulsion.
>
> 22. We have carefully considered whether the difference in statutory language between the ICI scheme and the accreditation sections applicable to other sectors warrants a different approach. It is true that section 145(a) [now 157(a)], applicable to the ICI scheme, is clearer in its limiting effect because of the inclusion of the words "but only" which do not appear in the accreditation sections. Nonetheless, sections 127 to 134 [now 134 to 141] read as a whole make it clear that the imposition of rights by law was intended to relate to the sector and geographic area set out in the

> accreditation order. The wording of section 131(2) [now 138(2)] which makes the collective agreement entered into by the Association binding upon the employer as if it had entered into it itself is also qualified by the wording "subject to and for the purposes of this Act". We are persuaded that the purpose of the Act in the accreditation sections was to impose a scheme based on sectoral bargaining, and that it did not contemplate the imposition by operation of law of rights beyond the sectors set out. The practical implication is that, as a non-member, Elirpa is not bound by the agreement made by the Association for other than the geographic area and sector for which it was accredited. Accordingly, it is our finding that Article 15.5 of the sewer and watermain collective agreement [the cross-over clause] is not applicable to Elirpa in the road building sector.

In my view, the responding party is bound by all the provisions of the Low Rise Agreement, including the cross-over clause in section 1.04 by virtue of the Board declaring on May 13, 2008 that the responding party was bound by the Low Rise Agreement. The fact the responding party also became bound by the Low Rise Agreement as a matter of law at the same time by virtue of the certificate of accreditation issued to the intervenor by the Board in January 2008 does not detract from the result of it having agreed to a declaration it was bound by the Low Rise Agreement, without qualification. Thus the reasoning developed by the Board in *Elirpa Construction & Materials Ltd.* has no application to facts before me in this proceeding.

24. Similarly, the Board's decision in *Platinum Drywall Inc.*, cited earlier, which also dealt with a situation where the scope of the accreditation order affected the reach of the collective agreement, does not assist the responding party in this case.

25. The Board therefore dismisses the preliminary motion made by the responding party.

26. In the result, the Board finds the responding party was required by virtue of section 1.04 of the Low Rise Agreement to abide by the terms and conditions of the High Rise Agreement when its employees in the Low Rise Agreement bargaining unit performed work on the high rise residential project in Board Area 8 that is the subject of this grievance.

27. This matter is referred to the Manager of Field Services to appoint a Labour Relations Officer to meet with the parties to endeavour to effect a resolution of the remaining issues, if any, in this matter.

COURT PROCEEDINGS

1386-06-R (Court File No. 09-DV-1471) International Union Of Painters And Allied Trades, Local 1795, The Ontario Council Of Painters And Allied Trades, And International Union Of Painters And Allied Trades, Local 557 -and- The **Cadillac Fairview Corporation Ltd.**, CF/Realty Holdings Inc., Queenston Road Investment Inc., Eastgate Square Holdings Inc., Redcliff Realty Management Inc., Centre Mall Holdings Inc., Kenilworth Avenue Investment Inc., Ontario Labour Relations Board

Construction Industry – Judicial Review – Related Employer – Sale of a Business – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – On judicial review, concerning the single employer application, the court noted there was no identity of existence between the pre- and post-amalgamation corporations, something contemplated by the Amalgamation Agreement and the *Business Corporations Act* – The Board's decision not to exercise its discretion to grant the relief requested was reasonable – The Court also found the Board's finding that there was no sale of business at any time was reasonable – Application dismissed

Superior Court of Justice (Divisional Court), Leitch, Dambrot and Swinton JJ., December 4, 2009

1 **K.E. SWINTON J.** (orally): — The applicant trade unions seek judicial review of the decision of the Ontario Labour Relations Board dated January 20, 2009 which dismissed their application to have Cadillac Fairview Corporation Ltd. ("Cadillac Fairview") declared a "related employer" pursuant to s. 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 or a "successor employer" pursuant to s. 69(2) of the Act.

2 The standard of review of the Board's decision applying its constituent Act to the facts of this case is reasonableness.

3 Pursuant to s. 1(4), the Board has a discretion whether to declare related employers to be one employer for purposes of the Act. While Cadillac Fairview and Cadco carried on related businesses, the Board refused to declare them to be one employer following the amalgamation of Cadillac Development and The Fairview Corporation in 1974. The Board applied its existing jurisprudence, determining that the amalgamation of the two corporations did not have the effect of eroding the bargaining rights of the unions acquired by the voluntary recognition agreements with Cadco and its predecessor.

4 In particular, the Board found that there was an identity of existence between the pre- and post-amalgamation corporations. I note this is contemplated by paragraph 2 of the Amalgamation Agreement and by the provisions of the *Business Corporations Act*.

5 The Board went on to find (at paragraph 27 of its Reasons):

> Further, if the Board would not exercise its discretion to find that Cadillac Development Corporation Limited and Cadco are one employer, it is impossible to see how that analysis is changed by the addition to the business of Cadillac Developments of a similar business of another non-union employer, i.e. Fairview. Fairview carried on the same business as Cadillac Developments, not the same business as Cadco. After the amalgamation, Cadillac Fairview continued to do what Cadillac Developments and Fairview had done before the amalgamation, that is, assemble and develop land. Cadco continued to do what it had done, operate a general contractor's business whose only client, or whose primary client,

> was the corporation that owned and controlled it. The amalgamation itself did not create any erosion or potential for erosion of bargaining rights to any greater extent than the existence of Cadillac Development did on the day the Working Agreements were signed.

Therefore, the Board refused to exercise its discretion to grant the relief sought by the unions.

6 The Board's decision is a reasonable one, based on the facts, and it does not demonstrate any error of law.

7 The Board determined that there was not a sale of business in 1981 or 1982 when Cadco ceased operating and, therefore, s. 69(2) of the Act did not apply.

8 It is implicit in the Board's decision that it found there was no sale of a business in 1974 at the time of the amalgamation, as the Board explicitly found that Cadco continued the general contracting business it had been conducting prior to the amalgamation, and Cadillac Fairview continued the development business that the amalgamating corporations had been doing prior to the amalgamation (see para. 27).

9 Moreover, in paragraph 30, the Board found that Cadillac Fairview did not take up the business of Cadco in 1981 or 1982 when Cadco was shut down. The Board stated:

> More importantly, Cadillac Fairview did not acquire or take up the business of Cadco. It continued to do what it had always done: engage a general contractor to build its projects. It did not do what Cadco did, that is, to act as a general contractor, letting portions of the main contract to specialized sub-trades. Cadco's business was wound up. It disappeared. There was nothing left to transfer to anyone and nothing was transferred to Cadillac Fairview. There was no sale or transfer of a business of any sort.

10 Given these conclusions, it is implicit that there had been no transfer of the business of Cadco in 1974. Again, the decision of the Board that there was no sale of a business at any time is reasonable, given the facts and the findings.

11 Therefore, the application for judicial review is dismissed.

12 L.C. LEITCH J. (orally):-- Costs ought to be awarded in favour of the two respondents and we fix the amount of those costs at $4,000.00 to each respondent.

1386-06-R (Court File No. 09-DV-1471) Ottawa-Carleton Public Employees Union (CUPE), Local 503 -and- City of Ottawa, B & G Gorham Construction Inc., Rob Burns operating as Burns Landscaping Maintenance, Concordia Paving Ltd., Thomas Cavanagh Construction Limited, Exel Contracting Inc., Jake's Lawn Care, Kern's Property Maintenance, Landtech Inc., Laurent Leblanc Limited, M.A. Thompson Cartage Limited, Malcolm Morris operating as Mac Morris Cartage & Equipment Rentals and Mac & Mike

Morris Equipment Rentals, Mountainview Turf Farm Ltd., Yannick Brule operating as Need a Cut Services, Prop-Com Management Inc., Quinn & Company, Kanata West Landscaping Maintenance and OLRB

Judicial Review – *Prima Facie* Motion – Related Employer – Sale of a Business – CUPE alleged that the City of Ottawa and the other responding parties were a single employer because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the City – On a motion by the City to dismiss for no *prima facie* case, the Board held that the union was unable to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The Board further held that the City's existing relationships with CUPE and the contractors permitted contracting out, and any operational control over the work performed by the contractors was to be expected given the City's mandate to provide municipal services – On judicial review, the Court found that CUPE had not been denied natural justice or procedural fairness since a hearing into the motion had been held and the parties were given the opportunity to make full submissions – The Court found the Board's exercise of discretion under s. 1(4)of the Act to be reasonable – Application dismissed

Superior Court of Justice (Divisional Court), Jennings, G.I. Thomson and R.D. Reilly JJ., November 19, 2009

The following judgment was delivered by

1 THE COURT:-- The applicant Ottawa-Carleton Public Employees Union (CUPE), Local 503 (CUPE) seeks judicial review of a decision of Patrick Kelly, vice-chair of the Ontario Labour Relations Board (the Board) dated May 8, 2007. The Board ruled on a preliminary motion brought by the respondents to dismiss an application filed by CUPE pursuant to the "sale of business" and "related employer" sections of the Labour Relations Act, 1995 (the Act). The Board held that the applicant had failed to plead sufficient facts to support a finding of a sale of a business and that it had pled no evidence to warrant a declaration that the respondents were related employers.

2 CUPE seeks in this application to quash only the s. 1(4) related employer aspect of its application.

BACKGROUND

3 CUPE represents approximately 7,000 unionized workers who do outdoor surface operations including grass cutting, maintaining parks and repairing roads and ditches. The respondent City of Ottawa (the City) entered into a number of contracts with the 18 corporate co-respondents to perform grass cutting and other outdoor maintenance duties for the City. The employees of the respondent companies are not unionized.

4 CUPE cla ims that too much work is going to non-unionized employees, since despite an increase in demand for outdoor surface work since the amalgamation of the City, some 250 to 300 union jobs have been lost. CUPE filed its application with the Board alleging inter alia that the City and the 18 respondent corporations are a single contractor (related employer) under s. 1(4) of the Act.

5 Pursuant to s. 1(4) of the Act the Board may declare related employers as one employer if their activities are carried out under common control. The purpose of the section is to prevent organizations from conducting business through multiple corporate vehicles in order to circumvent collective bargaining agreements.

6 The City moved before the Board pursuant to r. 39.1, of the Board's Rules of Procedure seeking to have CUPE's application dismissed on the basis that the facts as pleaded did not make out a prima facie case for a related employer finding. At the hearing, the Board reviewed CUPE's pleadings. It heard the submissions of the parties and considered the relevant authorities cited to it. The Board subsequently gave extensive reasons for granting the application.

RELEVANT LEGISLATION

> *The Act s. 1(4):*
> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
>
> *Act s. 1(5):*
> Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.
>
> *Board's Rules of Procedure, r. 39.1*
> Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

STANDARD OF REVIEW

7 CUPE agrees with the respondents that had it been afforded procedural fairness and natural justice on the r. 39.1 hearing, the appropriate standard of review would be reasonableness. It submits, however, that it was denied procedural fairness and natural justice and that accordingly it is unnecessary to determine the standard of review.

8 We reject CUPE's submission. The parties had a notice of the preliminary hearing, they appeared before the Board and made their submissions which were considered and resulted in the decision under review. There was no denial or natural justice or procedural unfairness.

9 Accordingly, the standard of review is, as agreed, reasonableness.

ANALYSIS

10 The Board was alive to its obligations under a r. 39.1 application, stating at paragraph 6 of the reasons:

> For purposes of dealing with the arguments of the responding parties. I must and I do assume, without deciding, that the union's allegations are true and provable.

11 In paragraphs 30 and 31 of its reasons the Board reviewed jurisprudence establishing that the Board must exercise considerable restraint in exercising its discretion to dismiss a complaint on the grounds that it does not disclose a prima facie case. The Board was well aware that the power must be exercised only in the clearest of cases.

12 After reviewing the jurisprudence on related-employer decisions, and considering the test to be applied, the Board set out the ratio for its decision in paragraph 48 of the reasons as follows:

> 48. This ease shares a number of similarities with the circumstances in the Canadian Red Cross case. There is clearly an interrelationship of functions between the City and its contractors. But CUPE makes no allegation that the responding contractors have any connection to one another, except through the City. The union does not claim there is common ownership or common management or even beneficiaries in common among any of the contractors. CUPE does say the City exercises extraordinary control over the contractors' work, but it does not suggest that this equates to financial control over the contractors. In fact, it did not dispute the assertions of the responding parties that the vast majority of the contractors have sources of revenue other than the City's work. Moreover, the union appears to have no compelling answer to the City's assertion that it is a creature of statute, mandated to provide municipal services, and that that is the reason it exercises control over the work regardless of whether it is performed by its own unionized employees, or the employees of third-party contractors.

13 The Board concluded its findings in paragraph 50:

> 50. I would not exercise my discretion to grant a section 1(4) declaration in this matter, which would have the effect of collapsing the City's municipal subcontracting relationships. The union has not pled facts which, assuming them to be true and provable, would cause me to declare that the City and the contractors are one employer for the purposes of the Act.

14 Both s. 1(4) of the Act and r. 39.1 give the Board a discretion to act. It has not been demonstrated to us that the discretion was wrongly exercised. The very extensive reasons demonstrate

a full appreciation of the position taken by the parties, of the restrictions the jurisprudence has placed upon the exercise of the Board's discretion and of the evidentiary requirement that the Board accept the applicant's pleadings as being capable of proof.

15 The finding of related employer was one directly within the Board's mandate and area of expertise. The finding is entitled to deference and it was reasonable.

16 The application is dismissed.

17 Counsel for the Board does not seek costs and we order no costs against it. If the remaining parties are unable to agree on costs, brief written submissions not to exceed 3 pages in length may he filed within 15 days of the release of this decision.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0509-07-R: Labourers International Union of North America Ontario Provincial District Council (Applicant) v. Looby Construction Limited Looby Builders (Dublin) Limited L.J. Looby Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Looby Construction Limited in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0017-08-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. 2089863 Ontario Limited (Respondent)

Unit: "all construction labourers in the employ of 2089863 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 2089863 Ontario Limited in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (9 employees in unit)

0825-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Looby Construction Limited, Looby Builders (Dublin) Limited and L.J. Looby Construction Ltd. (Respondent) v. Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Intervener)

Unit: "all construction labourers in the employ of Looby Construction Limited in all sectors of the construction industry in the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1597-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Berkley Developments Inc. (Respondent)

Unit: "all construction labourers in the employ of Berkley Developments Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3598-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. Niacon Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Niacon Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Niacon Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0346-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kirby Structures Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Kirby Structures Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Kirby Structures Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

0393-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1151376 Ontario Limited c.o.b. Danco Building Services (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1151376 Ontario Limited c.o.b. as Danco Building Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of 1151376 Ontario Limited c.o.b as Danco Building Serivices in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0469-09-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. EBC Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of EBC Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of EBC Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (3 employees in unit)

1087-09-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. M3C Demolition Ltd. (Respondent)

Unit: "all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of M3C Demolition Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of M3C Demolition Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (11 employees in unit)

1466-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Redi-Wall Forming & Concrete Inc. (Respondent)

Unit: "all construction labourers in the employ of Redi-Wall Forming and Concrete Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

1932-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Yirka Contracting 2006 Ltd. (Respondent)

Unit: "of all constructions labourers, operating engineers and teamsters engaged in on-site construction in the employ of Yirka Contracting 2006 Ltd. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1935-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Sunrise Concrete Inc. (Respondent)

Unit: "all construction labourers in the employ of Sunrise Concrete Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Sunrise Concrete Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2005-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Baiocco Construction Corp. and Baiocco Development Corp. (Respondents)

Unit: "all construction labourers, operating engineers, carpenters and carpenters' apprentices in the employ of Baiocco Construction Corp. and Baiocco Development Corp., in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2069-09-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 4116747 Canada Inc. and 4221311 o/a MCL Electric/ MCL Electrique (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 4116747 Canada Inc. and 4221311 o/a MCL Electric/MCL Electrique in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 4116747 Canada Inc. and 4221311 o/a MCL Electric/MCL Electrique in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2117-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. Woodall Construction Co. Limited (Respondent)

Unit: "all construction labourers in the employ of Woodall Construction Co. Limited in all sectors of the construction industry in the Counties of Essex and Kent, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2148-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Luxor Homes Corporation (Respondent)

Unit: "all painters and painters' apprentices in the employ of Luxor Homes Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Luxor Homes Corporation in all sectors of the construction industry in the City of Toronto, the

Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit) (Clarity Note)

Bargaining Agents Certified Subsequent to Vote

2112-07-R: Communications, Energy and Paperworkers Union of Canada, Local 2003 (Applicant) v. GreenField Ethanol Inc. (Respondent)

Unit: "all operating engineers employed by GreenField Ethanol Inc. in its facilities in the City of Chatham save and except the Chief Operator and persons above the rank thereof" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0050-08-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. OJCR Construction Ltd. (Respondent) v. Canadian Construction Workers' Union (Intervener)

Unit: "all employees of OJCR Construction Ltd. while working in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (28 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	2
Number of ballots segregated and not counted	0

0574-09-R: Service Employees International Union Local 2 Brewery General and Professional Workers' Union (Applicant) v. 1715587 Ontario Inc. (Respondent)

Unit: "all employees of 1715587 Ontario Inc. working at 123 Slater Street in the City of Ottawa save and except supervisors and persons above the rank of supervisor" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

1463-09-R: National Organized Workers (Applicant) v. ABC Climate Control Systems Inc. (Respondent)

Unit: "all employees of ABC Climate Control Systems Inc. at 54 Bethridge Road, Toronto, Ontario save and except group leaders and persons above the rank of group leader, clerical, office, sales and accounting staff" (240 employees in unit)

Number of names of persons on revised voters' list	258
Number of persons who cast ballots	236
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	204
Number of segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	122
Number of ballots marked against applicant	77
Number of ballots segregated and not counted	32

1539-09-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Dovercourt Boys' and Girls' Club (Respondent) Unit: "all employees of the Dovercourt Boys' and Girls' Club working at 180 Westmoreland Avenue and 120 Perth Avenue, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (18 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	7

1579-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Park Place Manor (Respondent)

Unit: "all employees of Park Place Manor in the City of Aurora, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

1651-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Crown Hospitality Suites Inc. o/a Super 8 (Respondent)

Unit: "all employees of Crown Hospitality Suites Inc. o/a Super 8 in the City of Sarnia, save and except persons exercising managerial function" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	3

1692-09-R: Niagara Health Care & Service Workers Union Local 302 affiliated with the Christian Labour Association of Canada (Applicant) v. Revera Retirement LP Garrison Place Retirement Residence (Respondent) v. Seafarers' International Union of Canada (Intervener)

Unit: "all employees of Revera Retirement LP Garrison Place Retirement Residence in the Town of Fort Erie, save and except department managers (including supervisors), those above rank of department manager (including supervisor), and Director of Nursing" (34 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked in favour of intervener	3
Number of ballots segregated and not counted	0

1709-09-R: Retail, Wholesale & Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. Niyan Properties Inc. o/a Comfort Inn Cornwall (Respondent)

Unit: "all employees of Niyan Properties Inc. o/a Comfort Inn Cornwall working in the City of Cornwall, save and except assistant managers and persons above the rank of assistant manager and students working during the school summer vacation" (26 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1713-09-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dywidag Systems International, Canada, Ltd. (Respondent)

Unit: "all employees of Dywidag Systems International, Canada, Ltd. in its plant operations in the Regional Municipality of York save and except supervisors and persons above the rank of supervisor, sales, office and clerical staff" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	4

1770-09-R: The Canadian Union of Public Employees (Applicant) v. Huron-Perth Catholic District School Board (Respondent)

Unit: "all employees employed as Hall Monitors by the Huron-Perth Catholic District School Board in the counties of Huron and Perth in its secondary schools, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of September 22, 2009" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1804-09-R: Labourers' International Union of North America, Local 837 (Applicant) v. Innovative Cleaners Inc. (Respondent)

Unit: "all employees of Innovative Cleaners Inc. at Hamilton Health Sciences in the City of Hamilton, save and except supervisors, persons above the rank of supervisor and office staff" (20 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1811-09-R: Ontario Public Service Employees Union (Applicant) v. Guelph Independent Living (Respondent)

Unit: "all employees of Guelph Independent Living in the City of Guelph, save and except co-ordinators, persons above the rank of co-ordinator, office and clerical staff" (65 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	5

1838-09-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Interglass Inc. (Respondent)

Unit: "all employees of Interglass Inc. in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office and clerical staff, technicians and engineers" (90 employees in unit)

Number of names of persons on revised voters' list	97
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	4

1857-09-R: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. Ability Janitorial Services Limited (Respondent)

Unit: "all employees of Ability Janitorial Services Limited working at 2650 Queensview Drive in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	3

1925-09-R: Ontario Nurses' Association (Applicant) v. Strathroy Middlesex General Hospital (Respondent)

Unit: "all registered and graduate nurses and all registered practical nurses employed in a nursing capacity by the Strathroy Middlesex General Hospital (Middlesex County), save and except supervisors and persons above the rank of supervisor" (158 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	165
Number of persons who cast ballots	129
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	121
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	98
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	8

1946-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Sunnybrook Health Sciences Centre (Respondent)

Unit: "all parking attendants of Sunnybrook Health Sciences Centre in the City of Toronto, save and except supervisors, persons above the rank of supervisor, and persons already covered by an existing collective agreement" (32 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26

1964-09-R: Service Employees International Union, Local 1 Canada (Applicant) v. Community Nursing Home Port Perry Ltd. (Respondent)

Unit: "all employees in housekeeping, dietary and laundry department of Community Nursing Home Port Perry Ltd. in the City of Port Perry save and except supervisor, persons above the rank of supervisor and office and clerical" (32 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

2017-09-R: Public Service Alliance of Canada (Applicant) v. Commissionaires - Kingston & Regional Division (Respondent)

Applications for Certification Dismissed Subsequent to Vote

3331-03-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rochon Building Corporation (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Rochon Building Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Rochon Building Corporation in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2389-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Dinardo C. Group Inc. (Respondent)

Unit: "all construction labourers in the employ of Dinardo C. Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Dinardo C. Group Inc. in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working forepersons and persons above the rank of non-working foreperson" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0027-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. LifeLabs Medical Laboratory Services (Respondent)

Unit: "all employees of LifeLabs Medical Laboratory Services in the Town of Markham and the Regional Municipality of Durham, save and except salespersons and persons exercising managerial function" (28 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	0

0888-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Bayshore HomeHealth (Respondent) v. The Ontario Nurses' Association ("ONA") (Intervener)

Unit: "all Registered Nurses at Bayshore Home Health that work out of the Sarnia office, in the City of Sarnia in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff and on-call co-ordinators" (27 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

1593-09-R: The Canadian Union of Public Employees (Applicant) v. The Hospital for Sick Children (Respondent)

Unit: "all employees of The Hospital for Sick Children in the City of Toronto regularly employed for 24 hours or less per week, save and except professional medical staff, Graduate and Undergraduate Nurses, Graduate and Undergraduate Pharmacists, Graduate Dietitians, Dietetic Interns, Social Workers, Child Care Workers, Play Park Attendants, Recreationists, persons engaged in research work, technical personnel, Supervisors, persons above the rank of Supervisor, Foremen, persons above the rank Foreman, Chief Engineer, Office and Clerical staff, Security Guards, students employed during the school vacation period, and employees currently represented by a trade union." (102 employees in unit)

1764-09-R: Service Employees International Union Local 2, Brewery, General and Professional Workers Union (Applicant) v. Domus Building Cleaning Company Limited (Respondent)

Unit: "all employees of Domus Building Cleaning Company Limited working at 1620 Scott Street in the City of Ottawa save and except supervisors and persons above the rank of supervisor" (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

1840-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Premi-Air Inc. (Respondent)

Unit: "all journeypersons and apprentice refrigeration and air-conditioning mechanics and maintenance mechanics employed by Premi-Air Inc. performing maintenance and/or service work in the Province of Ontario save and except persons above the rank of working foreperson." (7 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	4

1962-09-R: Teamsters Local Union 938 (Applicant) v. Convoy Supply (Canada) Ltd. (Respondent) Unit: "all employees of Convoy Supply Ltd. at 100 Midwest Road in the city of Toronto, save and except, foreman persons above the rank of foreman, office, clerical, and sales staff and summer students" (11 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2

Number of ballots marked against applicant	9
Number of ballots segregated and not counted	2

Applications for Certification Withdrawn

0510-08-R; 0526-08-R; 0835-08-R; 0881-08-R: Construction Workers Union Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener); Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Looby Construction Limited, Looby Builders (Dublin) Limited and L.J. Looby Construction Ltd. (Respondent); Construction Workers Union Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Looby Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council on its own Behalf and on Behalf of its Affiliated Local Unions (Intervener)

2397-08-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Morin Isolation & Toitures Ltee (Morin Insulation & Roofing Ltd.) (Respondent)

3772-08-R: Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise of Burlington (Respondent)

1543-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ferrari Concrete Ltd. (Respondent)

2122-09-R: UNITE HERE (Applicant) v. Hilton Garden Inn Toronto City Centre, o/a Easton's Group of Hotels, Inc., o/a 1293446 Ontario Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2061-08-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Berkley Homes (Wasaga) Inc., Berkley Homes (Blue Water) Inc., Berkley Developments Inc., Silver Pine Management Inc. (Respondents) *(Withdrawn)*

3137-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Durocast Structural Group Inc. and, 2137161 Ontario Inc. (Respondents) *(Withdrawn)*

3593-08-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. CAP Concrete Structures Ltd.; C.A.D. Structures, Division of 1760896 Ontario Inc.; Nordica Construction Co. Inc.; Stealth Underground Services (Respondents) *(Endorsed Settlement)*

0270-09-R: Brick and Allied Craft Union of Canada, Brick and Allied Craft Union of Canada, Local 4, Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. RHI Canada Inc., A.P. Green Refractories (Canada) Ltd., Plibrico (Canada) Ltd., ANH Canada Refractories Inc., North American Refractories Company, Harbison-Walker Company and. Global GIX Canada Inc. (Respondents) *(Withdrawn)*

0443-09-R: International Brotherhood of Electrical Workers Local 120 (Applicant) v. Medway Contracting Group Inc., Medway Electric Ltd., I.C.E. Contracting Inc. (Respondents) *(Terminated)*

0895-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A & B Rail Contractors Inc. and, A & B Rail Services Ltd. (Respondents) *(Withdrawn)*

0988-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Accutech Design Limited and, DMAC Automation Limited (Respondents) *(Withdrawn)*

1265-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Mega Wall Concrete Forming Ltd. and, Marj Drain & Concrete Ltd. (Respondents) *(Granted)*

SALE OF A BUSINESS

0543-08-R: Ontario Nurses' Association (Applicant) v. Queen's University, Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston (Respondents) v. Ontario Public Service Employees Union (Intervener) *(Granted)*

3137-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Durocast Structural Group Inc. and, 2137161 Ontario Inc. (Respondents) *(Withdrawn)*

3593-08-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. CAP Concrete Structures Ltd.; C.A.D. Structures, Division of 1760896 Ontario Inc.; Nordica Construction Co. Inc.; Stealth Underground Services (Respondents) *(Endorsed Settlement)*

0270-09-R: Brick and Allied Craft Union of Canada, Brick and Allied Craft Union of Canada, Local 4, Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers and International Union of Bricklayers and Allied Craftworkers, Local 4 (Applicant) v. RHI Canada Inc., A.P. Green Refractories (Canada) Ltd., Plibrico (Canada) Ltd., ANH Canada Refractories Inc., North American Refractories Company, Harbison-Walker Company and, Global GIX Canada Inc. (Respondents) *(Withdrawn)*

0443-09-R: International Brotherhood of Electrical Workers Local 120 (Applicant) v. Medway Contracting Group Inc., Medway Electric Ltd., I.C.E. Contracting Inc. (Respondents) *(Terminated)*

0833-09-R: HD Industrial Services Inc. (Hydro Vac Division) (Applicant) v. United Steelworkers of America, Local 4153, and, International Union of Operating Engineers, Local 793 (Respondents) *(Granted)*

0895-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A & B Rail Contractors Inc. and, A & B Rail Services Ltd. (Respondents) *(Withdrawn)*

0988-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Accutech Design Limited and, DMAC Automation Limited (Respondents) *(Withdrawn)*

1265-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Mega Wall Concrete Forming Ltd. and, Marj Drain & Concrete Ltd. (Respondents) *(Granted)*

1570-09-R: The Ontario Secondary School Teachers' Federation (OSSTF) (Applicant) v. The Renfrew County District School Board and The Murchison & Lyell District School Area Board (Respondents) *(Withdrawn)*

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1748-09-R: The Ontario Secondary School Teachers' Federation (OSSTF) (Applicant) v. Wilfrid Laurier University Staff Association, Wilfrid Laurier University (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1822-09-R: Marcin Duran (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) Local 4153 (Respondent) v. Aero-Kit Industries Inc. (Intervener) *(Granted)*

Unit: "all employees of Aero-Kit Industries Inc. in the City of Burlington, save and except supervisors, persons above the rank of supervisors, office, sales, clerical, engineering staff and students." (9 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

1861-09-R: Elizabeth Heale, Diane Mohammadi and Lynne Hertz being employees of Victorian Order of Nurses - Algoma Branch (Applicant) v. Ontario Nurses' Association (Respondent) *(Granted)*

1878-09-R: Roger Enrique Gonzalez (Applicant) v. Universal Workers Union, L.I.U.N.A. Local 183 (Respondent) v. Anatolia Tile Inc. (Intervener) *(Granted)*

Unit: "all employees of Anatolia Tile Inc. employed at 240 Parkway, in the City of Vaughan, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff." (72 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	13

1905-09-R: Adrieke Smit (Applicant) v. Christian Labour Association of Canada (Respondent) *(Granted)*

1938-09-R: Sue Jones (Applicant) v. S.E.I.U. Local #2 Brewery General & Professional Workers Union (Respondent) *(Dismissed)*

1957-09-R: Kevin Robert Silliker (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Konecranes Canada Inc. o/a Crane Pro Services (Intervener) *(Granted)*

Unit: "all employees in the employ of Konecranes Canada Inc. o/a Crane Pro Services, working in and out of the Municipalities of Burlington and Whitby, save and except persons above the rank of working foreperson, office and sales staff, parts personnel and shipping and receiving personnel" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

Number of ballots segregated and not counted 0

2012-09-R: Richard Millar (Applicant) v. SEIU Local 2 (Respondent) v. Morton Parker Limited (Intervener) *(Granted)*

Unit: "the Company agrees to recognize the Union as the Collective Bargaining Agent for the employees of the Company in respect to hours, wages, seniority, grievance procedure and all their working conditions. The provisions of this Agreement shall not apply to office employees, foremen and those above the rank of foreman and shall apply to those employees as stipulated by the O.L.R.B." (8 employees in unit)

2053-09-R: Sylvia Goyan Redmond (Applicant) v. CAW Local 229 (Respondent) *(Withdrawn)*

2071-09-R: Mario Pessoa De Oliveira (Applicant) v. Service Employees International Union Local 1.on C.L.C. (Respondent) *(Dismissed)*

2081-09-R: Employees of ADM COCOA Georgetown, ON (Applicant) v. United Food and Commercial Workers Canada Local 1977 (Respondent) v. ADM Agri-Industries Company (Intervener) *(Granted)*

2082-09-R: Sue Jones (Applicant) v. SEIU Local #2 Brewery General & Professional Workers Union (Respondent) v. VSI Inc. (Vista Security & Investigations) (Intervener) *(Granted)*

2113-09-R: Flexmaster Canada Limited (Unionized Employees) (Applicant) v. Sheet Metal Workers' International Association Local Union #30 Production Workers (Respondent) *(Dismissed)*

2157-09-R: Employees/Super 8/Crown Hospitality Suites Inc. (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) v. Super 8/Crown Hospitality Suites Inc. (Intervener) *(Dismissed)*

2228-09-R: Rachel Ayres (Applicant) v. Canadian Office and Professional Employees Union Local 468 (Respondent) *(Dismissed)*

2253-09-R: 1167471 Ontario Limited o/a Mudges Appliances (Applicant) v. UFCW Locals 175 & 633 Canada (Respondent) *(Dismissed)*

2265-09-R: Sico Industrial Coatings' Employees Ref: Cambridge Service Center (Applicant) v. United Steel Workers (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2004-09-U: Otis Canada Inc. and, National Elevator and Escalator Association (Applicants) v. International Union of Elevator Constructors, Local 50,, International Union of Elevator Constructors, Local 96, Stephen Sampson, Ken Bell, Ben McIntyre, Ron McNevin, Al Caverly, Paul Keddy, Jason Richards, James Welsh, Mike McKinnon and John Devlin (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1891-09-U: Melloul-Blamey Construction Inc. (Applicant) v. The International Union of Painters and Allied Trades, Local Union 1891. Greg Smith,Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, United Brotherhood of Carpenters and Joiners of America, Local Union 675 and Robert Chang (Respondents) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3378-06-U: Teamsters Local Union No. 879 (Applicant) v. Service Employees International Union Local 1.On (Respondent) *(Withdrawn)*

3575-06-U: Ontario Construction Secretariat (Applicant) v. International Union of Elevator Constructors and National Elevator and Escalator Association (Respondent) *(Endorsed Settlement)*

1113-07-U: Brick and Allied Craft Union of Canada and Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council, Ontario Masonry Contractors Association, Masonry Industry Employers Council of Ontario, Patrick Little, Joseph Mancinelli and, John Blair, Provincial Employer Bargaining Agency - Labourers, Labourers Employee Bargaining Agency (Respondents) v. International Union of Bricklayers and Allied Craftworkers, International Union of Bricklayers and Allied Craft Workers, Locals 6, 7 and 31, Industrial Contractors Association of Canada, Construction Labour Relations Association of Ontario, Sealant and Waterproofing Association (Interveners) *(Terminated)*

3660-07-U: Carrie Fitzpatrick (Applicant) v. Teamsters Local Union 847 (Respondent) *(Dismissed)*

3797-07-U: International Association of Machinists and Aerospace Workers (Applicant) v. Toyota Motor Manufacturing Canada Inc. (Respondent) *(Withdrawn)*

0052-08-U: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. 2089863 Ontario Limited (Respondent) *(Granted)*

0259-08-U: Kimberley Ann Gilmour (Applicant) v. Elementary Teachers' Federation of Ontario/, Hastings Prince Edward Occasional Teachers' Local (Respondents) v. Hastings and Prince Edward District School Board (Intervener) *(Withdrawn)*

0939-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Looby Construction Limited, Looby Builders (Dublin) Limited and L.J. Looby Construction Ltd. (Respondent) v. Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Intervener) *(Withdrawn)*

1411-08-U: Arlene Danos and Tracey MacLeod (Applicant) v. Canadian Union of Public Employees, Local 1750 (Respondent) *(Granted)*

2776-08-U: Alan Sabri (Applicant) v. CAW Local 195 (Respondent) *(Dismissed)*

3535-08-U; 3565-08-U; 3703-08-U; 3717-08-U; 0047-09-U : Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Thorn Mill (Respondent) *(Withdrawn)*; Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Aurora (Respondent) *(Withdrawn)*; Sunrise Senior Living (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) *(Withdrawn)*; Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Unionville (Respondent) *(Withdrawn)*;

3659-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalren Limited (Respondent) *(Withdrawn)*

3785-08-U: Tahniad Binte-Siraj (Applicant) v. United Steelworkers (Respondent) *(Withdrawn)*

0017-09-U: Dalren Limited (Applicant) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America and, Carpenters Union, Central Ontario Regional Council Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Local 397 (Respondents) *(Withdrawn)*; Service

Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Burlington (Respondent) *(Withdrawn)*

0033-09-U: Sandra Benns (Applicant) v. Power Workers' Union Canadian Union of Public Employees Local 1000 - C.L.C. (Respondent) v. Inergi LP (Intervener) *(Withdrawn)*

0298-09-U: Elva Mitchelmore (Applicant) v. Bakery, Confectionery, Tobacco and Grain Millers International Union, Local 264 (Respondent) v. Dare Foods Limited (Biscuit Division) (Intervener) *(Dismissed)*

0349-09-U: Ontario Public Service Employees Union (Applicant) v. Canadian Blood Services (Respondent) *(Withdrawn)*

0529-09-U: The Sheraton on the Falls Hotel Bell Staff (Uniform Service) Members/Employees (Applicant) v. Workers United Local 2347 (Ontario Council) formerly: Unite Here Ontario Council and Unite Here Local 2347 (Respondent) *(Dismissed)*

0556-09-U: Kirby Structures Limited (Applicant) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Withdrawn)*

0583-09-U: Chris Kristensen (Applicant) v. Power Workers Union - Local 1000 (Respondent) *(Withdrawn)*

0643-09-U: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Trudel & Sons Roofing Ltd. (Respondent) *(Granted)*

0692-09-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kirby Structures Limited (Respondent) *(Withdrawn)*

0698-09-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Native Child and Family Services of Toronto (Respondent) *(Withdrawn)*

0797-09-U: Wayne Hnatchuk (Applicant) v. Canadian Union of Public Employees and its Local 3 (Respondent) v. The City of Sault Ste. Marie (Intervener) *(Dismissed)*

0901-09-U: Kerry Louise Atkins (Applicant) v. Canadian Union of Public Employees and its Local 132 (Respondent) v. The Regional Municipality of Durham (Intervener) *(Withdrawn)*

0910-09-U: 1151376 Ontario Limited c.o.b.as Danco Building Services (Applicant) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Withdrawn)*

0989-09-U: International Association of Machinists and Aerospace Workers (Applicant) v. Accutech Design Limited and, DMAC Automation Limited (Respondents) *(Withdrawn)*

1129-09-U: Power Workers' Union, Canadian Union of Public Employees Local 1000 - CLC (Applicant) v. CRU Solutions Inc., Erie Thames Powerlines Corporation, Ecaliber (Canada) Inc., ERTH Corporation, ERTH360 Generation & Consulting Inc., Coulter Services Inc., Laurie Palmer, Todd Ross., Scott Garton and, Chris White (Respondents) *(Withdrawn)*

1155-09-U: Canadian Union of Public Employees and its Local 2875 (Applicant) v. Queensway Carleton Hospital (Respondent) *(Withdrawn)*

1255-09-U: Ontario Public Service Employees Union (Applicant) v. Northern Ontario School of Medicine (Respondent) *(Withdrawn)*

1259-09-U: Maria Dimitrakakis (Applicant) v. Canadian Union of Public Employees, Local 1590 (Respondent) v. Providence Healthcare (Intervener) *(Dismissed)*

1335-09-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Alta Vista Manor Inc. (Respondent) *(Withdrawn)*

1394-09-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. 1715587 Ontario Inc. (Respondent) *(Withdrawn)*

1398-09-U: Local 74 of the Canadian Union of Public Employees (Applicant) v. Corporation of the Municipality of Clarington (Respondent) *(Withdrawn)*

1401-09-U: Maria Menga, Juan Gonzalez, Dora Cruz and Maria De Almeida (Applicant) v. Canadian Construction Workers' Union (Respondent) *(Withdrawn)*

1425-09-U: Toronto Civic Employees' Union, Local 416 (Applicant) v. York Community Services (Respondent) *(Withdrawn)*

1455-09-U: Durham Region Transit part-time employees past and present, members of CAW Local 222 in Ajax, Pickering and Oshawa (Applicant) v. CAW Local 222 representing Durham Region Transit employees (Respondent) v. Durham Region Transit Commission (Intervener) *(Withdrawn)*

1632-09-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Ferrari Concrete Ltd. and, Fortunato Ferrari (Respondents) *(Withdrawn)*

1663-09-U: Sheet Metal Workers' International Association, Local 30 Brian Harsell (Applicant) v. Close Comfort Ltd. Eric Close (Respondent) *(Withdrawn)*

1668-09-U: The Canadian Union of Public Employees (Applicant) v. The Hospital for Sick Children (Respondent) *(Withdrawn)*

1919-09-U: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. Ability Janitorial Services Limited (Respondent) *(Withdrawn)*

1939-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. JBL Construction, (A Division of 1644472 Ontario Limited) (Respondent) *(Endorsed Settlement)*

2022-09-U: Virginia Cortez (Applicant) v. SEIU Local 1 (Respondent) *(Dismissed)*

2050-09-U: Teamsters Local Union 938 (Applicant) v. Convoy Supply (Canada) Ltd. (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

3534-08-M; 3564-08-M: Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Thorn Mill (Respondent) *(Withdrawn)*; Service Employees International Union, Local 1 Canada (Applicant) v. Sunrise Senior Living Aurora (Respondent) *(Withdrawn)*

1458-09-M: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Almon Equipment Ltd. (Respondent) *(Granted)*

1818-09-M: International Brotherhood of Electrical Workers, Local 1739 Brendan Phillips (Applicant) v. 1693377 Ontario Inc. o/a KB Electric (Respondent) *(Withdrawn)*

1923-09-M: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) and its Local 2020-005 and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) and its Local 6500 (Applicant) v. Vale Inco Limited (Respondent) *(Dismissed)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1315-09-M: IAC Automotive Components Alberta Ltd. (Applicant) v. Workers United Ontario Council (Respondent) *(Granted)*

FINANCIAL STATEMENT

0654-08-M: Stefano Labardo (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) *(Terminated)*

3470-08-M: Sheryl Toop, Suzan Cleary and Corinne Kellar, CUPE Local 1974 Members (Applicant) v. Louis Rodrigues, CUPE Local 1974 President, Joan Buchanan, CUPE Local 1974 Treasurer, Paul Moist, CUPE National President (Respondents) *(Terminated)*

JURISDICTIONAL DISPUTES

1353-09-JD: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Safeguards Technology LLC, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Respondents) v. Electrical Power Systems Construction Association (Intervener) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0640-08-OH: Glen Doherty (Applicant) v. Canadian Diabetes Association (Respondent) *(Dismissed)*

1688-08-OH: Rodney Desjardins (Applicant) v. Bitumar (Hamilton) Inc. (Respondent) *(Withdrawn)*

0814-09-OH: Sheila Cosman (Applicant) v. Attridge Transportation Inc. (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0347-08-G: Canadian Union of Skilled Workers (Applicant) v. AMEC NCL Limited (Respondent) *(Withdrawn)*

1025-08-G; 1567-08-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Salwood General Contractors Inc.,1660434 Ontario Inc.and, Domenic Loschiavo o/a Starwood General Contractors Inc. an unregistered business name) (Respondents) *(Endorsed Settlement)*

1596-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Zerem Electrical Services Ltd. (Respondent) *(Withdrawn)*

1613-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Zerem Electrical Services Ltd. (Respondent) *(Withdrawn)*

3124-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Durocast Structural Group Inc. (Respondent) *(Withdrawn)*

0026-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Granted)*

0444-09-G: International Brotherhood of Electrical Workers Local 120 (Applicant) v. Medway Contracting Group Inc., Medway Electric Ltd., I.C.E. Contracting Inc. (Respondents) *(Terminated)*

0829-09-G: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Construction and Allied Workers Local Union 607 (Applicant) v. A & B Rail Contractors Inc. and, A & B Rail Services Ltd. (Respondents) *(Withdrawn)*

0929-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B & B Millwork Inc. and, Brenda Arnason (Respondents) *(Endorsed Settlement)*

1268-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. London Paving Bros. Inc. (Respondent) *(Withdrawn)*

1295-09-G: The United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 6788912 Canada Inc., 1716616 Ontario Limited (o/a Capco Construction) (Respondents) *(Granted)*

1384-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Miwel Construction Limited (Respondent) *(Withdrawn)*

1537-09-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Paul Comeau c.o.b. Invinci Home Building Solutions Inc. (an unregistered business name) (Respondent) *(Granted)*

1619-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Revenco (1991) Inc. and, Sylvain Houle (Respondents) *(Granted)*

1669-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Jemini Construction Ltd. (Respondent) *(Terminated)*

1711-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 Local 787 (Applicant) v. Johnson Controls LP (Respondent) *(Withdrawn)*

1715-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Jemini Construction Ltd. (Respondent) *(Terminated)*

1768-09-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contracting Corp. and David Norris, a Director (Respondents) *(Terminated)*

1772-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicant) v. Sayers & Associates Limited (Respondent) *(Granted)*

1777-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Crossby-Dewar Inc. (Respondent) *(Withdrawn)*

1782-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Vanbet Services Inc. (Respondent) *(Withdrawn)*

1787-09-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevator (Canada) Ltd. (Respondent) *(Withdrawn)*

1794-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Pupatello & Sons Ltd. (Respondent) *(Withdrawn)*

1796-09-G: International Union of Painters and Allied Trades Local Union 557 (Applicant) v. George Croteau, David Cates and, G-Tec Painting Limited (Respondents) *(Endorsed Settlement)*

1797-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Inex Drywall Limited (Respondent) *(Withdrawn)*

1802-09-G: The International Union of Painters and Allied Trades, Local Union 1824 (Applicant) v. Merit Glass Ltd. (Respondent) *(Withdrawn)*

1807-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Barry Sculland o/a B. Sculland Electric (Respondent) *(Granted)*

1829-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Appiicant) v. Croma Painting Ltd. (Respondent) *(Withdrawn)*

1898-09-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Jason Droese c.o.b. as Jason Droese Contracting (Respondent) *(Withdrawn)*

1904-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1568278 Ontario Inc. o/a Basic Industries Glazing (Respondent) *(Endorsed Settlement)*

1914-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Vanbet Services Inc. (Respondent) *(Terminated)*

1920-09-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lancer Millwork & Project Management Inc. (Respondent) *(Granted)*

1921-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Econo Excavating & Paving (1991) Co. Ltd., a Division of Tom-Con Inc. (Respondent) *(Granted)*

1922-09-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.R.T. Construction Limited (Respondent) *(Granted)*

1926-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pancor Industries Limited (Respondent) *(Granted)*

1929-09-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Granted)*

1930-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Da Silva c.o.b. as JD Installations/JD Cold Rooms (Respondent) *(Granted)*

1931-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) *(Granted)*

1934-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Benforest Developments Inc. (Respondent) *(Granted)*

1936-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Granted)*

1937-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wasero Construction (1991) Ltd. (Respondent) *(Granted)*

1956-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. 1660402 Ontario Limited o/a Universal Fire and Safety Ltd. (Respondent) *(Granted)*

1965-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. MacNeill & Roberts Ltd. (Respondent) *(Granted)*

1976-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joao V. Rocha c.o.b. as Portuguese Carpentry Contractor a.k.a Portuguese Carpentry Contract (Unregistered Business Names) (Respondent) *(Granted)*

1992-09-G; 1993-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Tagus Electrical Contractors Inc. (Respondent) *(Endorsed Settlement)*

2008-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Somerlyn Trim and Doors Inc. (Respondent) *(Withdrawn)*

2010-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Locals 700, 721 & 736 (Applicant) v. Flange Steel Erectors (Respondent) *(Granted)*

2029-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. George Bowie Electrical Ltd. (Respondent) *(Endorsed Settlement)*

2055-09-G: The United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. B & B Millwork Inc. (Respondent) *(Granted)*

2066-09-G: International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Stefcon Construction Inc. (Respondent) *(Terminated)*

2070-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) *(Endorsed Settlement)*

2072-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Nova Steel Systems Sudbury Inc. (Respondent) *(Endorsed Settlement)*

2079-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. YAG Limited (Respondent) *(Endorsed Settlement)*

2087-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Hi-Tek Dev Inc. (Respondent) *(Endorsed Settlement)*

2138-09-G: The International Union of Painters and Allied Trades, Local Union 1590 (Applicant) v. Abby Services Inc.and, Abby Services (Arva) Ltd. (Respondents) *(Granted)*

2185-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Skywall Systems Inc. and The Sky Construction Inc. (Respondents) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

0158-06-ES: Leticia Frimpong (Applicant) v. Universal Brake Parts Inc. and Director of Employment Standards (Respondents) *(Granted)*

1239-07-ES: Serge Goulet (Applicant) v. Kimberly-Clark Inc., Neenah Paper Inc., Neenah Paper Company of Canada, Buchanan Forest Products Ltd., Terrace Bay Pulp Inc., Eagle Logging Inc., Lucky Star Holdings Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

2470-07-ES: Mark McKinney (Applicant) v. Concord Equipment Sales and Service Inc. (Respondent) *(Endorsed Settlement)* 2593-07-ES: Elizabeth Leveillee (Applicant) v. C.W. Shasky & Associates Ltd., Director of Employment Standards (Respondents) *(Dismissed)*

2625-07-ES: Greg Durling (Applicant) v. 1353015 Ontario Limited o/a Nortech Drywall & Plastering and, Director of Employment Standards (Respondents) *(Dismissed)*

3282-08-ES: Prop-Com Management Inc. (Applicant) v. Bill Fogarasy and Director of Employment Standards (Respondents) *(Granted)*

3653-08-ES: Sentineal Carriages Inc. (Applicant) v. Angel Bisson and Director of Employment Standards (Respondents) *(Dismissed)*

3681-08-ES: Donald A. Turner (Applicant) v. 1379188 Ontario Limited o/a Lakeland Motorsports and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0070-09-ES: Guirong Fu (Applicant) v. Jia Jia International Moving Inc., and Director of Employment Standards (Respondents) *(Granted)*

0279-09-ES: 1454409 Ontario Inc. o/a Hazel Farms (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

0350-09-ES: Advanced Prefabs Ltd. (Applicant) v. Victor Button and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0382-09-ES: James Todd (Applicant) v. Ronald L. Edwards o/a The Furniture and Electronic Discounter and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0470-09-ES: 1454409 Ontario Inc. o/a Hazel Farms (Applicant) v. Nada Hadchiti and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0545-09-ES: Coco Paving (1990) Inc. o/a Coco Paving Inc. (Applicant) v. Jody Peltier and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0611-09-ES: Halla Climate Control Canada Inc. (Applicant) v. Shawn Simpson and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0628-09-ES: 1610597 Ontario Inc. and Pro-Po Enterprises Inc. o/a Coffee Time (Applicant) v. Lucy Wu and Director of Employment Standards (Respondents)*(Endorsed Settlement)* 0710-09-ES: Roy Foss Motors Ltd.(Applicant)v. Jessica Cyr Stankiewicz, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0731-09-ES: Arizon Disposal Services Inc. (Applicant) v. Nicholas Pallotta and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0740-09-ES: Carmina Iampietro (Applicant) v. HSB Steel Inc. o/a Hamilton Speciality Bar and/or Delaware Street Capital Master Fund, L.P. and Director of Employment Standards (Respondents) *(Withdrawn)*

0748-09-ES: Global Property Services Inc. (Applicant) v. Petter Thorsen, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0779-09-ES: Narisha Ali (Applicant) v. National Shoe Specialties Limited and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0794-09-ES: Kathy Oliver (Applicant) v. SLI Manufacturing Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0854-09-ES: Albert P. Mitchell (Applicant) v. Attila Bauer and Izabella Bauer and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1029-09-ES: Giao Qi Cheng (Applicant) v. Down-Town Duvets & Linens Ltd., and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1065-09-ES: Gemma Communications LP o/a Gemma Communications L (Applicant) v. Natalie Mahlung Hill and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1167-09-ES: Exel Canada Ltd. o/a Exel Global Logistics (Applicant) v. Joseph Sponagle and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1202-09-ES: Parathan Paramanathan (Applicant) v. Best Buy Canada Ltd./Magasins Best Buy Ltee and Director of Employment Standards (Respondents) *(Withdrawn)*

1336-09-ES: Ms. Pamela Chang (Applicant) v. CAA South Central Ontario o/a CAA General Insurance Company Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)***1339-09-ES:** Bobby Behzad Solhi, A Director of Viva Foods Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

1347-09-ES: Canadian Washroom Products Inc. (Applicant) v. Roland Munnik and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1367-09-ES: Eden Place Retirement and Wellness Home Inc.(Applicant) v. Tracey Sweet and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1435-09-ES: Jason Fuller and Peter Napolitano, Directors of Soma Restaurant and Lounge Inc. (Applicant) v. Leanne Penberthy and Director of Employment Standards (Respondents) *(Terminated)*

1470-09-ES: St. John The Baptist Anglican Church o/a St. John's Dixie Cemetary and Crematorium (Applicant) v. Paul Durigon and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1578-09-ES: Ferraro Painting & Restorations Inc. (Applicant) v. Benjie Millard and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1598-09-ES: Ugarrit Inc. o/a Riverside Mart & Service Station (Applicant) v. Bilal Jebahi and Director of Employment Standards (Respondents) *(Dismissed)*

1609-09-ES: Karoly Racz (Applicant) v. Paramount Properties Management, and Director of Employment Standards (Respondents) *(Terminated)*

1660-09-ES: 908593 Ontario Limited o/a Bloomfield Truck Stop (Applicant) v. Stacey Laprise, and Director of Employment Standards (Respondents) *(Terminated)*

1665-09-ES: Legacy Private Trust (Applicant) v. Nicole M. Lavery and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1673-09-ES: Debt Control Agency Inc.(Applicant) v. Elisha McLasky and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1686-09-ES: 1690175 Ontario Ltd. operating as Delta Truck Driving School (Applicant) v. Brendan Whalen and Director of Employment Standards (Respondents) *(Dismissed)*

1831-09-ES: Tien Van Nguyen (Applicant) v. Laser Tech Abrasives and Director of Employment Standards (Respondents) *(Terminated)*

1832-09-ES: Rodolfo Castulo (Applicant) v. William Ashley Ltd. and Director of Employment Standards (Respondents) *(Terminated)*

1846-09-ES: Urban Gourmet Food Market Ltd.(Applicant) v. Ian Hoekstra and Director of Employment Standards (Respondents) *(Terminated)*

1892-09-ES: Nick Scetta o/a Attecs Automotive Service (Applicant) v. Dave Mousani and Director of Employment Standards (Respondents) *(Terminated)*

1940-09-ES: Trenton Pet Hospital (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

2002-09-ES: Madresa Ashraful Uloom c/o Yusuf Panchbhaya (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

2093-09-ES: 1634443 Ontario Inc. o/a Mandara Health and Beauty Spa (Applicant) v. Christina Polisano and Director of Employment Standards (Respondents) *(Dismissed)*

2097-09-ES: Jennifer Sellars (Applicant) v. Revera Retirement Genpar Inc. o/a Glynnwood Retirement Residences, Director of Employment Standards (Respondents) *(Dismissed)*

2229-09-ES: Stephanie Ann Gogo (Applicant) v. Sodexo MS Canada Limited, Canadian Union of Public Employees - Local 1295, (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

3244-08-HS: Tinnerman Palnut Engineered Products Canada Corporation (Applicant) v. United Steelworkers of America, Local 4153, Peter Coutlee, Inspector (Respondents) *(Withdrawn)*

1042-09-HS: Emil Mesic, CAW Local 707 (Applicant) v. Ford Motor Company of Canada – Oakville Assembly Complex, Kelly Sebastian, Inspector (Respondents) *(Withdrawn)*

1067-09-HS: TWD Roads Management Inc. (Applicant) v. International Union of Operating Engineers, Local 793, Thomas McKay, Inspector (Respondents) *(Withdrawn)*

1136-09-HS: Bruce Power (Applicant) v. Worker Co-Chair of Joint Health and Safety Committee, Power Workers' Union, Society of Energy Professionals and, Kevin Deneve, Inspector (Respondents) *(Withdrawn)*

1186-09-HS: Conseil scolaire de district du Centre-Sud-Ouest (Applicant) v. Maurice Caronet, Kelly Sebastian, inspecteur et, Oded Nissan, inspecteur (Respondents) *(Withdrawn)*

1357-09-HS: Bruce Power (Applicant) v. Worker Co-Chair of Joint Health and Safety Committee, Power Workers' Union, Society of Energy Professionals and, Kevin Deneve, Inspector (Respondents) *(Withdrawn)*

1718-09-HS: Loblaw Companies Limited (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, Shela Mirza - Inspector Ministry of Labour (Respondents) *(Granted)*

1720-09-HS: Loblaw Companies Limited (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, Shela Mirza - Inspector Ministry of Labour (Respondents) *(Withdrawn)*

1754-09-HS: 1630648 Ontario Limited o/a NorFab Metal and Machine (Applicant) v. Dan Demontigny, Inspector (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE SMOKING IN THE WORKPLACE ACT

1320-09-M: Willy Schenk (Applicant) v. Four Seasons Roofing (Respondent) *(Withdrawn)*

FIRST AGREEMENT - DIRECTION

1205-09-FC: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent) *(Withdrawn)*

PAY EQUITY ACT

2875-08-PE: The Windsor Star (Applicant) v. Communications, Energy and Paperworkers Union, Local 517-G (Respondent) *(Granted)*

3035-08-PE: Communications, Energy and Paperworkers Union, Local 517-G (Applicant) v. The Windsor Star (Respondent) *(Granted)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0062-08-PS: Ontario Nurses' Association (Applicant)v. Queen's University (the "University") and Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston (Respondents) v. Ontario Public Service Employees Union (Intervener) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1125-08-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. George A. Kelson Ltd., International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondents) *(Granted)*

3606-08-R: Brick and Allied Craft Union of Canada (Applicant) v. E. S. Fox Limited (Respondent) *(Dismissed)*

0003-09-U: Timothy G. Mitchinson (Applicant) v. International Brotherhood of Electrical Workers, First District, Canada (Respondent) *(Dismissed)*

0161-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Adam Neilson and Director of Employment Standards (Respondents) *(Dismissed)*

0162-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Derek T.S. Elliott and Director of Employment Standards (Respondents) *(Dismissed)*

0234-09-U: Daniel Lee (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada(CAW-Canada)and its Local 414 (Respondent) v. Metro Ontario Inc.(Intervener) *(Withdrawn)*

1786-09-ES: Shah Z. Islam (Applicant) v. J. Ennis Fabrics Ltd. and Director of Employment Standards (Respondents)*(Dismissed)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0733-08-R: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Hi-Tek Dev Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Hi-Tek Dev Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all carpenters and carpenters' apprentices in the employ of Hi-Tek Dev Inc. in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non working foreman" (13 employees in unit) *(Having regard to the agreement of the parties.)*

1439-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Nathan Reid Homes Ltd. and , Reidco (86) Ltd. (Respondents)

Unit: "all construction labourers in the employ of Nathan Reid Homes Ltd. and Reidco (86) Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) *(Having regard to the agreement of the parties.)*

0061-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jeffrey Wayne Pankhurst c.o.b. Webuild (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Jeffrey Wayne Pankhurst c.o.b. We build in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of Jeffrey Wayne Pankhurst c.o.b. Webuild in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) *(Having regard to the agreement of the parties.)*

0481-09-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Senator Homes Inc. and/or, Gage Park Developments Limited and/or, Brecas Management Inc. (Respondents)

Unit: "all construction labourers in the employ of Senator Homes Inc., Gage Park Developments Limited and Brecas Management Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

1707-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. H.A.P. Mechanical Services Limited (Respondent)

Unit: "all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of H.A.P. Mechanical Services Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of H.A.P. Mechanical Services Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit) *(Having regard to the agreement of the parties.)*

2266-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Action Group Incorporated (Respondent)

Unit: "all construction labourers in the employ of Action Group Incorporated in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of Action Group Incorporated in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Having regard to the agreement of the parties.)*

2292-09-R: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Demasi Contracting Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Demasi Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, all painters and painters' apprentices in the employ of Demasi Contracting Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (Clarity Note) *(Having regard to the agreement of the parties.)*

2385-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1202682 Ontario Limited c.o.b. as B.A.M. Paving (Respondent)

Unit: "all construction labourers, truck drivers and employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors in the employ of 1202682 Ontario Limited c.o.b. as B.A.M. Paving in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit) *(Having regard to the agreement of the parties.)*

2477-09-R: International Union of Elevator Constructors, Local 50 (Applicant) v. Atlantic Lifts Ltd. (Respondent)

Unit: "all elevator constructors and elevator constructors' apprentices in the employ of Atlantic Lifts Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all elevator constructors and elevator constructors' apprentices in the employ of Atlantic Lifts Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Having regard to the agreement of the parties.)*

2505-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nashid Construction Corp. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Nashid Construction Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of Nashid Construction Corp. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) *(Having regard to the agreement of the parties.)*

2520-09-R: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Top Foam Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Top Foam Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters' apprentices in the employ of Top Foam Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (Clarity Note) *(Having regard to the agreement of the parties.)*

2523-09-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Diplock Floors Ltd. and, Lockwall Forming Ltd. (Respondents)

Unit: "all cement masons and cement masons' apprentices, carpenters and carpenters' apprentices, and construction labourers in the employ of Diplock Floors Ltd. and Lockwall Forming Ltd. in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Bargaining Agents Certified Subsequent to Vote

0723-08-R: Teamsters Local Union No. 419 (Applicant) v. Metro Waste Paper Recovery Inc. c.o.b. Metro Municipal Recycling Services Inc. (Respondent) v. The K.A.S. Group of Companies Inc. (Intervener)

Unit: "all employees of Metro Municipal Recycling Services Inc. and the K.A.S. Group of Companies Inc. working at 4590 Garrard Road in Whitby, Ontario, save and except Plant Manager, supervisor, those above the rank of supervisor, office, clerical and sales staff" (36 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	9

Number of ballots segregated and not counted	1

0709-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Windward Co-Operative Homes Incorporated (Respondent)

Unit: "all employees of Windward Co-Operative Homes Incorporated employed at 34 Little Norway Crescent, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor." (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

1528-09-R: Workers United Ontario Council (Applicant) v. XEROX Canada Inc. Oakville Colour Toner Plant (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees employed at the XEROX Canada Inc. Oakville Colour Toner Plant, Oakville, Ontario, save and except Associate Supervisors, Forepersons, persons above the rank of Associate Supervisor, Supervisor, Office Staff, Sales Staff, Technical Representatives, Engineers, Chemists, Draftspersons, Technical and Engineering Aids, Quality Control Auditors, Dispatchers, Expediters, Guards, Watchpersons, persons who regularly work less than twenty four (24) hours per week and students employed during the school vacation period" (57 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	51
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	46
Number of ballots marked in favour of intervener	5
Number of ballots segregated and not counted	0

1529-09-R: Workers United Ontario Council (Applicant) v. XEROX Canada Ltd., National Logistics Centre (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Xerox Canada Ltd., National Logistics Centre, employed at Xerox Distribution operations at 6800 Northwest Drive in Mississauga save and except Associate Supervisors, Supervisors, Foreman, Foreladies, persons above the rank of Associate Supervisor, Office Staff, Sales Staff, Technical Representatives, Engineering Aids, Auditors, Dispatchers, Expediters, Guards, Watchman, persons who regularly work less than twenty-four (24) hours per week and students employed during the school vacation" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

1658-09-R: Workers United Ontario Council (Applicant) v. Amhil Enterprises (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Amhil Enterprises, in the City of Mississauga, save and except office, clerical, sales and engineering staff and packaging coordinators and persons above the rank of packaging coordinator" (254 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	264
Number of persons who cast ballots	132
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	132
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	109
Number of ballots marked in favour of intervener	20
Number of ballots segregated and not counted	0

1722-09-R: Workers United Ontario Council (Applicant) v. Lonix Hats Inc. (Respondent) v. UNITE HERE (Intervener)

Unit: "all Cutters, Blockers, Operators, Finishers, Seamers, and Bushellers required by the Lonix Hats Inc. in the manufacturing of all Headwear such as Hats, Caps, and/or Children's Headwear, save and except Packers, Foremen, Office and Sales Staff, and persons regularly employed for not more than twenty-four (24) hours per week" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1723-09-R: Workers United Ontario Council (Applicant) v. Compass Group Canada Beaver) Ltd. (operating as Morrison Healthcare Food Services) (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Compass Group Canada (Beaver) Ltd. (operating as Morrison Healthcare Food Services) at the North York General Hospital (4001 Leslie Street) and Branson site (555 Finch Ave. West) in North York, Ontario, save and except supervisors, persons above the rank of supervisor, chef and office and sales staff" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

1751-09-R: Workers United Ontario Council (Applicant) v. Compass Group Canada Ltd. (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Compass Group Canada Limited at the Canada Post Corporation South Central Plant save and except supervisors, persons above the rank of supervisor, chef and office and sales staff" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	1

2001-09-R: Workers United Ontario Council (Applicant) v. T. Lipson & Son Limited (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees in the City of Toronto, excluding executives, supervisory employees, experimental and professional employees, quality inspectors, technical and administrative employees, cafeteria employees, company store employees, clerical and office employees, shipping and warehouse staff or other employees exercising a managerial function or employed in a confidential capacity" (66 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2026-09-R: Power Workers' Union, CUPE Local 1000, C.L.C. (Applicant) v. London Hydro Inc. (Respondent)

Unit: "all employees of London Hydro Inc. employed in the City of London for 24 hours or less per week, save and except supervisors and persons above the rank of supervisor" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5

2106-09-R: Workers United Ontario Council (Applicant) v. Bernard Athletic Knit & Enterprises Limited (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of Bernard Athletic Knit & Enterprises Limited, in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (177 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	172
Number of persons who cast ballots	153
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	153
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	118
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	0

2203-09-R: The Ontario Nurses' Association (Applicant) v. LIUNA Local 837 Nursing Home Ltd.(Hamilton) o/a Queens Garden (Respondent)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by LIUNA Local 837 Nursing Home Ltd. (Hamilton) o/a Queens Garden, save and except the Assistant Director of Care and persons above the rank of Assistant Director of Care" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	

Number of ballots segregated and not counted	1

2210-09-R: Power Workers' Union, C.U.P.E. Local 1000, C.L.C. (Applicant) v. Electrical and Utilities Safety Association of Ontario (Respondent)

Unit: "all employees of the Electrical and Utilities Safety Association of Ontario employed in the Province of Ontario save and except supervisors and persons above the rank of supervisors" (29 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

2252-09-R: Workers United Ontario Council (Applicant) v. Comfort Inn HOCO Limited (Respondent) v. UNITE HERE (Intervener)

Unit: "all employees of HOCO Limited normally and regularly performing work at the Comfort Inn within the following classifications: room attendants, house persons, janitors and bellpersons save and except part time employees" (25 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2301-09-R: United Food and Commercial Workers International Union, Local 175 Applicant) v. Pharmx Rexall Drug Stores Ltd. (Respondent)

Unit: "all employees of Pharmx Rexall Drug Stores Ltd. at 62 Robertson Road in the City of Ottawa, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Graduate and Undergraduate Pharmacists, including Pharmacy Interns and Apprentice Pharmacists, and office staff" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0555-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Structure Corp. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2680-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Henry Heyink Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the responding party in all sectors of the construction industry in the County of Lambton, save and except the industrial, commercial and institutional sector, and save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) *(Having regard to the agreement of the parties.)*

3692-08-R: Labourers' International Union of North America, Local 837 (Applicant) v. Always Dependable Service Inc. (Respondent)

Unit: "all employees of Always Dependable Service Inc. working at and out of Dundas, Ontario, save and except supervisors, persons above the rank of supervisor, and office, sales and clerical employees." (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	3

0501-09-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ramsey Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

2011-09-R: Southwestern Ontario Health Care and Service Workers, Local 303, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. 2091653 Ontario Inc. c.o.b. as Comfort Inn - St. Thomas (Respondent)

Unit: "all employees of 2091653 Ontario Inc. c.o.b. as Comfort Inn - St. Thomas in the City of St. Thomas, save and except supervisors, persons above the rank of supervisor, and office and clerical staff." (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	3

2215-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. 1473269 Ontario Ltd. o/a Ambassador Porter Services (Respondent)

Unit: "all employees, including baggage porters and cashiers, of Ambassador Porters Services Ontario 1473269 Ltd., excluding supervisors and those above the rank of supervisor in Lester B. Pearson International Airport, Terminals One (1) & Three (3), Mississauga, Ontario." (115 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	26

2221-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Robinson Solutions (Oshawa) Inc. (Respondent) v. Teamsters Local Union 938 (Intervener)

Unit: "all employees of Robinson Solutions (Oshawa) Inc. working under a contract with General Motors at the General Motors Plant in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (158 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	158
Number of persons who cast ballots	143
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	142
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	63
Number of ballots marked against applicant	79
Number of ballots segregated and not counted	0

2223-09-R: Teamsters Local Union No. 419 (Applicant) v. Waste Services (CA) Inc. (Respondent)

Unit: "all employees of the Waste Services (CA) Inc. working in or out of the City of Barrie, Ontario, excluding supervisors, persons above the rank of supervisor, mechanics, office, clerical and sales staff" (71 employees in unit) *(Having regard to the agreement of the parties.)*

Applications for Certification Withdrawn

0813-07-R; 1944-08-R; 1967-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. Weathertech Restoration Services Inc. and London Calking (Respondent), Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Weathertech Restoration Services Inc. (Respondent) v. International Union of Bricklayers and Allied Craftworkers, Local 5 (Intervener)

2778-08-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Paclaw Building Restoration Inc. (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Intervener)

3678-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. L. Mailloux Construction (2000) Inc. (Respondent)

0738-09-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. MBR Construction Limited (Respondent)

1621-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Precision Excavating Ltd. (Respondent)

1653-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1389999 Ontario Inc. o/a Graham Restorations (Respondent)

1825-09-R: U.F.C.W. Local 333 (Applicant) v. 1381794 operating as Radisson Plaza Mississauga Toronto Airport (Respondent)

1866-09-R: Carpenters Union, Central Ontario Reginal Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. DS Agencies (Respondent)

2283-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Drexler Construction Limited (Respondent)

2318-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. Graham Construction & Engineering Inc. and/or , Jasper Construction Ltd. (Respondents)

2430-09-R: Ontario Sheet Metal Workers' & Roofers' Conference (Applicant) v. Close Comfort Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1559-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Nathan Reid Homes Ltd., Reids Uptown Homes, , Reidco North Ltd., , Reidco (86) Ltd. and , Reidco 86 Ltd. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

1283-07-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853, Sprinkler Fitters of Ontario (Applicant) v. Maycrest Fire Protection Ltd. and/or Albion Fire Protection Inc. (Respondents) *(Withdrawn)*

1037-08-R: Teamsters Local Union No. 419 (Applicant) v. Metro Waste Paper Recovery Inc. c.o.b. as Metro Municipal Recycling Services Inc. and, The K.A.S. Group of Companies Inc. (Respondents) (Granted)

1519-08-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Weston on the Humber Inc. and, 2043102 Ontario Limited o/a YYZed Project Management (Respondents) v. Canadian Construction Workers' Union (Intervener) *(Dismissed)*

3676-08-R: Sheet Metal Workers' International Association, Local Union 269 (Applicant) v. Alberici Constructors, Ltd., Hillsdale Structures LP, Alberici Northern Group Ltd. (Respondents) *(Terminated)*

1004-09-R: Labourers' International Union of North America, Local 527 (Applicant) v. Laurent Leblanc Limited and, Beaver Construction Group Inc. (Respondents) *(Withdrawn)*

1557-09-R: La Fédération des enseignantes et enseignants des écoles secondaires de l'Ontario (FEESO) (Applicant) v. Le Conseil scolaire catholique de district des Grandes Rivières (CSCD Grandes Rivières) and the, Moosonee Roman Catholic Seperate School Board (Moosonee RCSSB) (Respondents) v. Ontario Public Service Employees Union , Le syndicat canadien de la fonction publique, local 7777 (SCFP) (Interveners) *(Withdrawn)*

1604-09-R: United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46 (Applicant) v. Bay Point Mechanical Inc., Breda Mechanical Contractor Inc. (Respondents) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Intervener) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3322-03-R: Independent Electricity Market Operator (Applicant) v. Canadian Union of Skilled Workers (Respondent) v. The Attorney General of Ontario (Intervener) *(Terminated)*

2118-04-R: Independent Electricity Market Operator (Applicant) v. Labourers' International Union of North America Labourers' International Union of North America, Ontario Provincial District Council and, Labourers' International Union of North America, Local 1059 (Respondents) v. The Attorney General of Ontario (Intervener) *(Terminated)*

2068-09-R: Margaret Hull (Applicant) v. CAW Local 229 (Respondent) v. St. Joseph's General Hospital (Intervener) *(Dismissed)*

Unit: "the employees of St. Joseph's Hospital in the City of Thunder Bay regularly employed for less than twenty five (25) hours per week in the classifications listed on Schedule A of the full time Collective Agreement between St. Joseph's Care Group and the National, Automobile, Aerospace, Transportation and General Workers' Union of

Canada (CAW - Canada) and for students employed for the school vacation period in the classifications listed on Schedule A of the full-time Collective Agreement between St. Joseph's Care Group and National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW - Canada) save and except professional medical staff, graduate pharmacists, under-graduate pharmacists, pharmacist assistants, graduate dieticians, student dieticians, technical personnel, social service workers, speech therapists, enterostomal therapist, recreational therapists, play therapists, audiologists, psychometrists, psychology assistants, counsellors, counsellor assistants, prosthetists, orthotists, pastoral care assistants, office and clerical staff, persons on a co-operative work study program, watchmen, members of the Sisters of St. Joseph of Sault Ste. Marie, supervisors, foremen, or forelady and persons covered by subsisting collective agreements" (147 employees in unit) *(Having regard to the agreement of the parties.)*

2167-09-R: Koch Heat Transfer Canada LP - Toronto (Applicant) v. The International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Respondent) v. Koch Heat Transfer Canada (Intervener) *(Terminated)*

Unit: "the Employer recognizes the Union as the sole collective bargaining agency for its employees in its fabricating plant in Toronto Ontario. This Agreement shall not apply to foreman and those above the rank of foreman, maintenance employees, shipping and receiving employees, quality assurance employees, sales employees and office, technical, and clerical staff, students hired during school vacation period, or persons employed on a co-operative training basis with a recognized university, college or school" (30 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	19
Number of ballots segregated and not counted	0

2194-09-R: Belinda Trottier (Applicant) v. Service Employees International Union, Local 1 (Respondent) v. St. Charles Village Limited Partnership c.o.b. as St. Charles Village (Intervener) *(Dismissed)*

Unit: "employees of St. Charles Village Limited Partnership c.o.b. as St. Charles Village, in the City of Welland, save and except registered and graduate nurses, office of clerical staff, security personal, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty four (24) hours per week, and students employed during the school vacation period" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	1

2322-09-R: James Craig Trenholm (Applicant) v. Teamsters Local Union 879 (Respondent) (Granted)

2331-09-R: Eric Davis and a Group of Dissatisfied Union Members of Maksteel (Applicant) v. CAW - Canada & its Local 252 (Respondent) v. Maksteel (Intervener) *(Dismissed)*

Unit: "all hourly rated employees employed by Maksteel in the region of Peel, save and except; supervisors, persons above the rank of supervisors, office, clerical and sales staff; engineering, information system and quality control staff; guards and students employed during the school vacation period" (66 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	52
Number of ballots marked against respondent	11
Number of ballots segregated and not counted	0

2379-09-R: Katie Meggitt (Applicant) v. United Food & Commercial Workers Union Canada, Local 175 (Respondent) *(Terminated)*

2431-09-R: Employees of Triumbari Corporation (Applicant) v. Teamsters Local Union 847 (Respondent) *(Terminated)*

2462-09-R: Jaswinder Dhillon for the employees of Canroof Corporation Inc. (Applicant) v. United Steel/Workers of America Local 9042-85 (Respondent) v. Canroof Corporation Inc. (Brampton) (Intervener) (Granted)

2566-09-R: Employees of Triumbari Corporation (Applicant) v. Teamsters Local Union 847 (Respondent) v. Triumbari Corp. (Intervener) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2501-06-U: Labourers' International Union of North America, Local 527 (Applicant) v. Laurent Leblanc Limited (Respondent) *(Withdrawn)*

3360-06-U: York University Staff Association (Applicant) v. York University (Respondent) *(Terminated)*

0628-07-U: David Brady (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222 (Respondent) *(Terminated)*

2765-07-U: Pioneer Construction Inc. (Applicant) v. Labourers' International Union of North America, Local 493 (Respondent) *(Withdrawn)*

3298-07-U: Tim Cadeau (Applicant) v. Teamsters Local Union No. 879 (Respondent) v. Service Employees International Union, Local 1.on (Intervener) *(Withdrawn)*

3422-07-U: Communications, Energy and Paperworkers Union of Canada and Communications, Energy and Paperworkers Union of Canada, Local 2003 (Applicant) v. Greenfield Ethanol Inc. (Respondent) *(Withdrawn)*

0008-08-U: Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. Provincial Advocate for Children and Youth and Agnes Samler (Respondent) *(Terminated)*

0811-08-U: Teamsters Local Union No. 419 (Applicant) v. Metro Waste Paper Recovery Inc. c.o.b. as Metro Municipal Recycling Services Inc. and, The K.A.S. Group of Companies Inc. (Respondents) *(Withdrawn)*

2083-08-U; 0280-09-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Weathertech Restoration Services Inc., Glen Bogart, Todd Bogart, Robert O'Neil and James Heskin (Respondent) *(Withdrawn)*; Labourers' International Union of North America, Ontario Provincial District Council and, Labourers' International Union of North America, Local 1059 (Applicants) v. Weathertech Restoration Services Inc. and, London Caulking and Installations Ltd. (Respondents) *(Withdrawn)*

3202-08-U: Lucy Carneiro (Applicant) v. Canadian Union of Public Employees and its Local 2544 (Respondent) v. Peel District School Board (Intervener) *(Terminated)*

3684-08-U: Lukasz Nyga (Applicant) v. Carpenters and Allied Workers Local Union 27, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Dismissed)*

0030-09-U: Labourers' International Union of North America, Local 837 (Applicant) v. Always Dependable Service Inc. (Respondent) *(Withdrawn)*

0363-09-U: Steven Ditta (Applicant) v. Employees' Association of Naylor Group Incorporated (Respondent) v. Naylor Group Incorporated (Intervener) *(Withdrawn)*

0508-09-U: Victor Harm (Applicant) v. Canadian Union of Public Employees and its Local 831 (Respondent) v. The Corporation of the City of Brampton (Intervener) *(Dismissed)*

0621-09-U: Vinay Bhandari (Applicant) v. O.P.S.E.U. Local 520 (Respondent) v. The Crown in Right of Ontario as represented by the Ministry of Education (Intervener) *(Dismissed)*

0886-09-U: Kai Noi Kinnarath (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Stirling Heights Long Term Care Centre (Intervener) *(Terminated)*

0957-09-U: Nilesh J. Prajapati (Applicant) v. United Food & Commercial Workers Locals 175 & 633 (Respondent) v. Mobile Climate Control, Inc. (Intervener) *(Withdrawn)*

1043-09-U: John Cody, Shane O'Brien, , Doug Sturgeon and , Tammy Beaulieu (Applicants) v. Teamsters Union Local 938 (Respondent) *(Dismissed)*

1068-09-U: Margaret B. Thomson (Applicant) v. Amalgamated Transit Union (Respondent) v. Miller Transit Limited (Intervener) *(Withdrawn)*

1306-09-U: Siegfried Kohlhammer (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Respondent) v. Modern Railings & Metalcraft Ltd. (Intervener) *(Terminated)*

1326-09-U: Ezra A. Taylor (Applicant) v. Ontario Nurses' Association (Respondent) v. Humber River Regional Hospital (Intervener) *(Withdrawn)*

1361-09-U: William Thomson (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) v. Toronto District School Board (Intervener) *(Dismissed)*

1654-09-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1389999 Ontario Inc. o/a Graham Restorations (Respondent) *(Withdrawn)*

1705-09-U: International Association of Machinists and Aerospace Workers (Applicant) v. Crown Hospitality Suites Inc. o/a Super 8 (Respondent) *(Withdrawn)*

1726-09-U: Service Employees International Union, Local 1 Canada (Applicant) v. Chartwell Park Place (Respondent) *(Terminated)*

1743-09-U: Jeffrey Forde (Applicant) v. Elementary Teachers' Federation of Ontario (ETFO) (Respondent) *(Dismissed)*

1767-09-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contracting Corp. and, Sirron Systems Inc. (Respondents) (Granted)

1809-09-U: 1389999 Ontario Inc. o/a Graham Restorations (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) *(Withdrawn)*

1942-09-U: Stephanie Adams (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada & its Local 199 (Respondent) v. General Motors of Canada Limited (Intervener) *(Withdrawn)*

1981-09-U: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. A. Julius Gubco and Sandor Olah c.o.b. as A.J. Stucco and Renovation (Respondent) *(Withdrawn)*

2023-09-U: Southwestern Ontario Health Care and Service Workers, Local 303, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. 2091653 Ontario Inc. c.o.b. as Comfort Inn - St. Thomas (Respondent) *(Withdrawn)*

2095-09-U: United Food and Commercial Workers Union Local 333 (Applicant) v. 1381794 operating as Radisson Plaza Mississauga Toronto Airport (Respondent) *(Withdrawn)*

2131-09-U: Joe D'Amario (Applicant) v. Universal Workers Union, L.I.U.N.A. Local 183 (Respondent) *(Withdrawn)*

2160-09-U: Wanda Martin (Applicant) v. United Steelworkers of America, Local 1-500 (Respondent) *(Terminated)*

2334-09-U: Teamsters Local Union No. 938 (Applicant) v. Ryder Truck Rental Canada Ltd. (Respondent) *(Withdrawn)*

2344-09-U: Stephen Bharath (Applicant) v. CAW National Council 4000 (Respondent) *(Dismissed)* 2414-09-U: Mohamed Gutale (Applicant) v. City of Ottawa (Respondent) *(Terminated)*

2418-09-U: Rev. Richard S. Mitchell (Applicant) v. CUPE 3993-05 (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2333-09-M: Teamsters Local Union No. 938 (Applicant) v. Ryder Truck Rental Canada Ltd. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2321-09-M: Central Bakery a Division of Canada Bread Company, Limited (Applicant) v. Bakery, Confectionery Tobacco Workers and Grain Millers International Union AFL-CIO, CLC, Local 264 (Respondent) (Granted)

JURISDICTIONAL DISPUTES

1706-07-JD: International Brotherhood of Electrical Workers, Local 530 (Applicant) v. Lamsar Inc. and, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Respondents) *(Dismissed)*

0094-09-JD: International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 58 ("IATSE, Local 58") (Applicant) v. International Brotherhood of Electrical Workers, Local 353 and, The Board of Governors of Exhibition Place (Respondents) *(Dismissed)*

0644-09-JD: The Crown in Right of Ontario as represented by the Ministry of Government and Consumer Services (Applicant) v. Ontario Public Service Employees Union (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0188-09-OH: Aldo Cerilli (Applicant) v. Vale Inco Ltd. (Respondent) *(Withdrawn)*

1227-09-OH: Brian Mroczniski (Applicant) v. Dyno Nobel Canada Inc. (Respondent) *(Withdrawn)*

1624-09-OH: David Enright (Applicant) v. Organic Resource Management Inc. (Respondent) *(Withdrawn)*

1652-09-OH: Leroy Francis (Applicant) v. Tughan Express Inc. (Respondent) *(Withdrawn)*

1696-09-OH; 2459-09-OH: Maurice Caron (Applicant) v. Le Conseil scolaire de district du Centre-Sud-Ouest (Respondent) *(Withdrawn)*

2027-09-OH: Kathy Harris (Applicant) v. The Waterfront Child and Development Centre Inc. and Anna Ebert and Stephani Gioia (Respondent) *(Terminated)*

2366-09-OH: Mark Bath (Applicant) v. Advantage Engineering (Respondent) *(Terminated)*

CONSTRUCTION INDUSTRY GRIEVANCES

3218-05-G: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Black & McDonald Limited (Respondent) *(Terminated)*

2502-06-G: Labourers' International Union of North America, Local 527 (Applicant) v. Laurent Leblanc Limited (Respondent) v. National Capital Road Builders Association (Intervener) *(Withdrawn)*

1639-07-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. PBW High Voltage Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353, Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (Interveners) *(Withdrawn)*

2370-07-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Tech 3 Inc. and 825677 Ontario Limited cob as Davis-Yonge Electric Inc. (Respondent) *(Withdrawn)*

3811-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, and its Local 721 (Applicant) v. The Electrial Power Systems Construction Association, and, Aecon Construction Group Inc. (Respondents) *(Withdrawn)*

0952-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Vanbots Construction Corporation (Respondent) *(Terminated)*

2035-08-G: Labourers' International Union of North America, Local 247 (Applicant) v. Scott Industrial Services, a Division of Scott Environmental Group Limited (Respondent) *(Terminated)*

3034-08-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Alpine Insulation Ltd. (Respondent) *(Withdrawn)*

0985-09-G: Teamsters Local Union No. 230, affiliated with the International Union of Teamsters (Applicant) v. Aro Excavating Ltd. (Respondent) *(Endorsed Settlement)*

1001-09-G: Labourers' International Union of North America, Local 527 (Applicant) v. Beaver Construction Group Inc. (Respondent) *(Withdrawn)*

1175-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Somerlyn Trim & Doors Inc. (Respondent) *(Withdrawn)*

1263-09-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A.M. Citriniti & Co. Limited (Respondent) *(Endorsed Settlement)*

1467-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. Siemens Building Technologies Limited (Respondent) *(Terminated)*

1499-09-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Black and McDonald (Respondent) v. Electrical Power Systems Construction Association. (Intervener) *(Withdrawn)*

1617-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Direct Energy Marketing Ltd. cob as Direct Energy Business Services (Respondent) *(Withdrawn)*

1618-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Direct Energy Marketing Ltd. cob as Direct Energy Business Services (Respondent) *(Withdrawn)*

1623-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 834 (Applicant) v. Ste-Alco Ltd. (Respondent) *(Withdrawn)*

1747-09-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Triumph Roofing & Sheet Metal Inc. (Respondent) *(Withdrawn)*

1755-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Harvey Refrigeration Ltd. (Respondent) *(Endorsed Settlement)*

1766-09-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contracting Corp. and , David Norris, a Director (Respondents) *(Endorsed Settlement)*

1778-09-G; 1779-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Bruce Power LP (Respondent) *(Withdrawn)*

1792-09-G: Labourers' International Union of North America, Local 837 (Applicant) v. Bravo Cement Contracting (Hamilton) Inc. (Respondent) (Granted)

1821-09-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Paul Millard o/a Peterborough Interiors (Respondent) *(Withdrawn)*

1974-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Miscellaneous Steel Installations Ltd. (Respondent) (Granted)

2018-09-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Aecon Construction and Materials Limited (Respondent) *(Withdrawn)*

2075-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1131042 Ontario Ltd. o/a Triple A Concrete & Drain (Respondent) *(Endorsed Settlement)*

2076-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1131042 Ontario Ltd. o/a Triple A Concrete & Drain (Respondent) *(Endorsed Settlement)*

2084-09-G: United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1007 (Applicant) v. Girotti St. Catharines Ltd. c.o.b. Girotti Machine (Respondent) *(Endorsed Settlement)*

2089-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. An-Dell Electric Limited (Respondent) *(Endorsed Settlement)*

2090-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. An-Dell Electric Limited (Respondent) *(Endorsed Settlement)*

2121-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Ainsworth Inc. cob as Superior Trade Services (Respondent) *(Withdrawn)*

2134-09-G: Construction and Allied Workers Local 607 (Applicant) v. Carillion Canada Inc. (Respondent) *(Withdrawn)*

2145-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Vision Almet Ltd. (Respondent) *(Withdrawn)*

2147-09-G: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Comstock Canada Ltd. (Respondent) *(Terminated)*

2151-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Applicant) v. Metro Plumbing & Heating Inc. (Respondent) (Granted)

2161-09-G: The United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. B & B Millwork Inc. (Respondent) (Granted)

2165-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The City of Toronto (Respondent) *(Withdrawn)*

2199-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrastone Construction Inc. and, Ron Colucci (Respondents) *(Endorsed Settlement)*

2201-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 6665268 Canada Inc. o/a Absolute Installations (Respondent) *(Endorsed Settlement)*

2213-09-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Design Ventilation Inc. (Respondent) *(Withdrawn)*

2219-09-G: Operative Plasterers and Cement Masons International Association of the United States and Canada Union Local 598 (Applicant) v. Brook Restoration Ltd. (Respondent) *(Withdrawn)*

2227-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. T C Contracting Inc. (Respondent) (Granted)

2240-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter

Local Unions participating in the OPC Trust Funds") (Applicant) v D.Thirteen Corporation (Respondent) *(Withdrawn)*

2274-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Stacey Electric Company Limited (Respondent) *(Withdrawn)*

2279-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mark Krytiuk c.o.b. as Krytiuk Specialty Contracting (Respondent) (Granted)

2296-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Clearwater Structures Inc. (Respondent) *(Endorsed Settlement)*

2304-09-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Black & McDonald Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 67 (Intervener)*(Withdrawn)*

2327-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1710488 Ontario Ltd. o/a Ararat Eifs Wall Systems (Respondent) (Granted)

2381-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B & B Millwork Inc. and, Brenda Arnason (Respondents) *(Endorsed Settlement)*

2387-09-G: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Metro Painters (2004) Limited (Respondent) (Granted)

2396-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. 1131042 Ontario Ltd. o/a Triple A Concrete & Drain (Respondent) *(Withdrawn)*

2498-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Commercial Aluminum Limited (1993) Limited, Falbo Aluminum Products Ltd. , Zenith Aluminum Systems Ltd. (Respondents) (Granted)

APPLICATIONS FOR ACCREDITATION

1284-09-R: Electrical Power Systems Construction Association (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Respondent) v. Quality Control Council of Canada , NDT Management Association , The Boilermaker Contractors' Association of Ontario (Interveners) (Granted)

1285-09-R: Electrical Power Systems Construction Association (Applicant) v. International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers (Respondent) (Granted)

APPEALS - EMPLOYMENT STANDARDS ACT

0341-06-ES: John Liabotis, a Director of Seven Dwarfs Ltd. (Applicant) v. Dimitrios Tzortizis and, Director of Employment Standards (Respondents) *(Terminated)*

1198-08-ES: The Ferns Golf & Country Club Inc./Graphite Specialty Products Inc. (Applicant) v. Aubrey Singleton and , Director of Employment Standards (Respondents) *(Dismissed)*

2402-08-ES: CBC Bingo Limited Partnership; Bingo Country Holdings Limited; Boardwalk Gaming and Entertainment Inc.; and Community Gaming & Enterainment Group GP Inc. (Applicant) v. Michael Spratt , Sonia Boutros , Dianne Kenney , Ronald Masse , Bonnie Lewenza , Julie Jaber , Sonny Lachapelle , Lucy Branston , Laura

Hicks , Reginald Appleyard , Marc Mourad , Monica Rock, Maureen Bedford and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2982-08-ES: Lisa Ashley o/a Molly Maid - Sudbury (Applicant) v. Kimberley Saulnier and, Director of Employment Standards (Respondents) *(Dismissed)*

2985-08-ES: Carolyn Lutgens (Applicant) v. Oxford University Press Canada and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3413-08-ES: Linda Speer (Applicant) v. Sunset Blinds Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

0080-09-ES: 1559792 Ontario Limited o/a Wimpy's Diner (Applicant) v. Travis MacAleese and, Director of Employment Standards (Respondents) (Granted)

0219-09-ES: Continental Mushroom Corporation (1989) Ltd. (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

0322-09-ES: Walsh Energy Inc., c.o.b. The Energy Centre (Applicant) v. Charles Holmes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0546-09-ES: Coco Paving (1990) Inc. o/a Coco Paving Inc. (Applicant) v. Scott Chapman and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0672-09-ES: Dwight Willard (Applicant) v. Ahmed Marei and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0772-09-ES: 2035868 Ontario Inc. o/a The Bollywood Bistro (Applicant) v. Anil Sharma and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0930-09-ES: Comfort Inn c/o Sol Palmeras Lodging Inc. (Applicant) v. Carmen Sauve and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0953-09-ES: Michal Augenblick (Applicant) v. Benjamin's Park Memorial Chapel Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0971-09-ES: The PasWord Group Inc. (Applicant) v. Christine Ivens, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1020-09-ES: Ronald Herbert Hayward (Applicant) v. Kesmac Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

1026-09-ES: Glenn Todd (Applicant) v. Dave's Drain Service Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1069-09-ES: 6881491 Canada Inc. o/a Tilted Kilt Neighbourhood Pub (Applicant) v. Tony Kozey and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1071-09-ES: Shu Fang Yang (Applicant) v. King Cole Holdings Limited o/a Queensville Farm Supply and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1083-09-ES: John D. Hawkins (Applicant) v. Canaccord Capital Corporation, and, Director of Employment Standards (Respondents) *(Withdrawn)*

1085-09-ES: Greenboro Lawn Care Inc. o/a Waterloo Golf Academy (Applicant) v. Jamie Cowan and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1091-09-ES: Knights on Guard Security Surveillance Systems Corporation (Applicant) v. Brandon Willis and, Director of Employment Standards (Respondents) *(Dismissed)*

1110-09-ES: Cosimo Mammoliti, a director of Terroni Inc. and 1418045 Ontario Limited o/a Terroni Restaurant (Applicant) v. Sarveswaran Kajanthan and, Director of Employment Standards (Respondents) (Granted)

1111-09-ES: Terroni Inc. and 1418045 Ontario Limited o/a Terroni Restaurant (Applicant) v. Sarveswaran Kajanthan and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1124-09-ES: Tryes International Group Ltd. o/a Pro Stone Werks (Applicant) v. Srinivasan Vijayavarman and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1145-09-ES: Peter Makos (Applicant) v. Tatangelo's Wholesale Fruits & Vegetables Ltd. and Director of Employment Standards (Respondents) *(Dismissed)*

1197-09-ES: Fred J. List (Applicant) v. 1188163 Ontario Ltd. o/a Municipal Waste & Recycling Consultants and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1218-09-ES: Lawrence Hill (Applicant) v. Scaffold-Russ Dilworth Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1248-09-ES: Satinder Singh Dhillon c.o.b. as Vampier Enterprises Ltd. (Applicant) v. Leon LeBlanc and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1260-09-ES: Mara Bossio (Applicant) v. Fara Mughal, and, Director of Employment Standards (Respondents) *(Dismissed)*

1281-09-ES: Kyle Martin Padmore (Applicant) v. 649604 Ontario Inc. o/a Feeney Plumbing & Contracting and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1368-09-ES: Eden Place Retirement and Wellness Home Inc. (Applicant) v. Ogo Ogbue and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1369-09-ES: Jerzy Nawrot (Applicant) v. Cyclone Manufacturing Incorporated and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1393-09-ES: Julius Thomas (Applicant) v. Future Shop, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1433-09-ES: Better Contracting Services (Applicant) v. Victor Woolacoot, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1457-09-ES: Rickert Enterprises Inc. o/a Stratford Airporter (Applicant) v. Linda Leversage and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1541-09-ES: Omar A. Ramos Bausero (Applicant) v. Yorksi Auto Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1553-09-ES: Nancy Sabo (Applicant) v. Orlick Industries Limited and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1575-09-ES: Richard Ling (Applicant) v. Luz Tacan and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1576-09-ES: Frank P. Simpson (Applicant) v. 1200181 Ontario Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1684-09-ES: Best Baking Inc., operating as Dufflet Pastries (Applicant) v. Derek Strickland and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1712-09-ES: Geralynn Petropoulos (Applicant) v. Tee-Bee-Que Limited o/a Tunnel Bar-B-Q and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1727-09-ES: Kenneth W.J. Rhodes o/a Rhodes Law Firm (Applicant) v. Karen Stefik and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1800-09-ES: Ying Chen (Applicant) v. Jiancheng Trade Ltd. and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1814-09-ES: Vimalasri Tharmalingam (Applicant) v. 6131646 Canada Inc. o/a Dave & Buster's and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1836-09-ES: Donald Rae Williams c.o.b. as Classic Painters (Applicant) v. Norton Steer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1837-09-ES: Donald Rae Williams c.o.b. as Classic Painters (Applicant) v. Larissa Ikeda and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1839-09-ES: Darryl W. McClennan (Applicant) v. Bendtech Inc., and, Director of Employment Standards (Respondents) *(Dismissed)*

1979-09-ES: 1352546 Ontario Ltd. o/a Cranberry Marsh Cove (Applicant) v. Heather Fraser, and, Director of Employment Standards (Respondents) *(Terminated)*

1980-09-ES: Muskoka Hospitality Group Inc. o/a Cranberry Marsh Cove (Applicant) v. Linda Trotter, and, Director of Employment Standards (Respondents) *(Terminated)*

2009-09-ES: 100698 Ontario Limited o/a Home Owners Association (Applicant) v. Victoria Dragonescu, and, Director of Employment Standards (Respondents) *(Terminated)*

2016-09-ES: Brenda Mills (Applicant) v. Beautyrock Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2108-09-ES: 1276061 Ontario Limited c.o.b. Fresh and Clean Carpet Cleaning (Applicant) v. Diana Cierpka and , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2110-09-ES: Turf Operations Scarborough Inc. (Applicant) v. John Surkos and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2112-09-ES: Jennifer Chung (Applicant) v. 2104047 Ontario Inc. o/a Fuzion House and, Director of Employment Standards (Respondents) *(Withdrawn)*

2128-09-ES: Dennis J. Coté (Applicant) v. Bruce Edmeades Company and, Director of Employment Standards (Respondents) *(Terminated)*

2141-09-ES: Mario Zizza and Son Construction (Applicant) v. Henry Lanting, and, Director of Employment Standards (Respondents) *(Terminated)*

2181-09-ES: Karen Hyde (Applicant) v. Collette Tours Canada, Ltd. and , Director of Employment Standards (Respondents) *(Withdrawn)*

2195-09-ES: The Legendary Red Rooster Vintage Cafe Inc. (Applicant) v. Andrea Gill and, Director of Employment Standards (Respondents) *(Dismissed)*

2196-09-ES: The Legendary Red Rooster Vintage Cafe Inc. (Applicant) v. Greg Phinney and, Director of Employment Standards (Respondents) *(Dismissed)*

2197-09-ES: The Legendary Red Rooster Vintage Cafe Inc. (Applicant) v. Randy Ferguson and, Director of Employment Standards (Respondents) *(Dismissed)*

2211-09-ES: 1639084 Ontario Inc. (Applicant) v. Marlene Lawrie and, Director of Employment Standards (Respondents) *(Terminated)*

2241-09-ES: Ceno Inc. (Applicant) v. Shouqiang Huang and, Director of Employment Standards (Respondents) *(Terminated)*

2295-09-ES: Michael Krawczyk (Applicant) v. 1120423 Ontario Limited o/a Comda, The Calendar People and, Director of Employment Standards (Respondents) *(Terminated)*

2390-09-ES: Aline Lapalme (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

3401-08-HS: Bravo Cement Contracting (Windsor) Inc. (Applicant) v. Nela Radakovic Karanovic, Sergio Fregonese, and, Barry Norton, Inspector (Respondents) *(Withdrawn)*

1454-09-HS: Innovative Management Solutions Group (Applicant) v. David Fung, Inspector (Respondent) *(Withdrawn)*

2298-09-HS: Hastings and Prince Edward Counties Health Unit (Applicant) v. Ontario Nurses Association, Canadian Union of Public Employees, Loralee Idler, Inspector (Respondents) *(Withdrawn)*

2312-09-HS; 2299-09-HS: Production Paint Stripping Limited (Applicant) v. Joe Zaher, Inspector (Respondent) *(Terminated)*

2490-09-HS: Sycor Technology Inc. Advance Wire & Cable (Applicant) v. Shela Mirza, Inspector (Respondent) *(Dismissed)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0592-09-ES: Vince Lehecka (Applicant) v. Ikon Office Solutions, Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1443-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Reliable Painters & Decorators, Ltd. (Respondent) *(Dismissed)*

1523-09-ES: Norman Elmer Delong (Applicant) v. Global Driver Services Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1786-09-ES: Shah Z. Islam (Applicant) v. J. Ennis Fabrics Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

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ISSN 0383-4778